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PRECEDENTS,

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Drafts of Actual Practice;

FORMING A

SYSTEM OF CONVEYANCING;

WITH

DISSERTATIONS, AND PRACTICAL NOTES.

BY THE LATE

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AND

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OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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By GEORGE SWEET, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

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ADVERTISEMENT.

THE Eighth Volume of this work, containing the title POWER OF ATTORNEY and the Preliminary Treatise on PURCHASES, was in an advanced state, when it was suggested that the early publication of the Precedents of Purchase Deeds would be more acceptable to the Subscribers. That volume was therefore laid aside, and the Ninth commenced. This will partly account for the non-appearance of the volume at an earlier period. Much of the delay has been occasioned by my being called upon to fulfil an old engagement to edit another work, which proved to be a task of considerably greater labour than I had anticipated. Upon the understanding that the Precedents are most urgently required, it is proposed to publish next, *and speedily*, the Tenth and Eleventh volumes, containing the conclusion of RELEASES AND COMPOSITION DEEDS, SETTLEMENTS AND CHARITY DEEDS, WARRANTS OF ATTORNEY and WILLS.

GEORGE SWEET.

60, *Chancery Lane*,
July, 1844.

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ERRATA ET ADDENDA.

Page 27, n. (*b*). The reference is to the stat. 17 Geo. 3, c. 50, s. 8.

96. End of first paragraph, refer to *Doe* d. *Egremont* v. *Date*, 3 Q. B. R. 609.

136. End of second paragraph, refer to *Simmons* v. *Pettit*, 8 Jurist, 209.

673. At the end of the note, add, "Conveyances on the repurchase of redeemable annuities are exempted from the ad valorem stamp duty, by stat. 55 Geo. 3, c. 184, s. 31."

766. End of first paragraph, refer to *Williamson* v. *The Advocate-General*, 10 Cl. & Fin. 1.

70. End of second paragraph, add, "And where a lease granted by the vendor out of his estate is in existence, the purchaser should not take a conveyance by appointment, because this would put an end to the reversion and the remedies for the rent and upon the covenants in the lease. And where the conveyance contains words of appointment and also of conveyance at common law, it seems, that, if it is capable of operating by appointment, the purchaser cannot elect to take under it at common law, and not by appointment. Vide ante, Vol. 2, p. 490; Vol. 4, p. 514."

PURCHASE DEEDS.

CONDITIONS OF SALE(a).

PRELIMINARY OBSERVATIONS.

CONDITIONS OF SALE.

As to special restrictions respecting title.

THE expedient of introducing into conditions of sale restrictions in regard to the title that the purchaser may require, has grown, naturally enough, out of the practice which has prevailed of late years, of subjecting titles to a more rigorous course of examination than they formerly received. It was found, that so few titles, comparatively, could undergo the test of this scrutiny, and were capable of being pronounced strictly marketable, that vendors became at length awakened to a sense of the danger of entering into contracts in total ignorance of the state of the title, and of assuming too readily that, because they have derived the property by descent from their ancestor, or acquired it by purchase, they must necessarily have an unimpeachable title for the purposes of sale. The dearly-bought experience of numerous plaintiffs and defendants in suits of equity for enforcing the specific performance of such contracts, has proved the fallacy of this conclusion. If, upon the previous investigation here recommended, evidence appears to be requisite to complete the title, the vendor has an opportunity of ascertaining whether it can be obtained, and if not, of preventing, by antecedent treaty, the evidence from being required: and if (as sometimes happens) the result of the investigation be to disclose a defect endangering the actual enjoyment, and, therefore, rendering it improper for the pos-

Necessity of investigating title before selling.

(a) [For the general law as to conditions of sale, &c., and for some of the notes on the law of vendors and purchasers, which were formerly prefixed to these precedents, see the Preliminary Treatise, in Vol. 8, and the title ABSTRACTS, ante, Vol. 1.]

(b) In this instance, and throughout the present article, the word "purchaser" is used in its confined and popular signification, *i. e.* as synonymous with *vendee*.

CONDITIONS OF SALE.

sessor of the estate to offer it for sale upon any terms, he avoids, by this means, the risk of an unnecessary exposure.

Effect of restrictive conditions.

Conditions of sale compelling the purchaser to accept a qualified title, are found to have much less effect in damping a sale than might have been expected; and even, when they go the length of providing, that the purchaser shall take any title that the vendor has, (which may, in effect, mean that he is to have no title whatever), bidders are not wanting. Probably, this is partly to be attributed to the technical nature of the subject, which prevents unprofessional persons from seeing the precise extent of the danger; for if a person, entering into a treaty as purchaser, were to insist that he should not be answerable for the genuineness of the money he offers in payment, he would find few persons disposed to part with their land or goods in exchange for so questionable a commodity; and yet, the risk to be encountered in dealing with the vendor of an estate, who says, that the purchaser shall take any title he happens to have, is not much less considerable. But, in the latter case, the danger is more obvious and familiar to the apprehension of persons in general, than in the former. In both, the fact of such a stipulation being exacted on the one side, is the precise reason why it should be resisted on the other, emanating as it does from the party who has the best means of knowing what the money or land is.

The necessity for more caution than is usually exercised by purchasers at auctions will strikingly appear when the result of the decisions is considered. Those decisions have established, that, if a purchaser enters into a stipulation to accept the vendor's title, such as it is, he cannot afterwards make the invalidity of the title a ground for resisting the performance of the contract. See *Freme* v. *Wright*, 4 Madd. 364; infra, p. 41.

Agreement to take any title not to be inferred from doubtful expressions.

A vendor meaning to compel the acceptance by a purchaser of any title which he happens to have, must explicitly declare such intention; and the Court will not infer it from ambiguous expressions. On this principle, a declaration that the vendor has only certain deeds in his possession, does not decidedly import that the purchaser shall accept the title contained in those deeds; it only shews, that he is to have the custody of no other deeds, not that they are to constitute all his title. *Dick* v. *Donald*, Bligh, N. S., 655; *Southby* v. *Hutt*, 2 Myl. & Cr. 20; ante, Vol. 1, p. 100.

As to production of very early deeds.

As to the liability of the vendor to produce *all* the deeds in his possession, however ancient, vide ante, Vol. 1, p. 62. It seems a prudent precaution for a vendor who has very early deeds in his

possession, the production of which, even if they do not create difficulties in the title, may be attended with great expense, to protect himself by express stipulation against being called upon to produce them.

Effect of stipulations restrictive of the vendor's obligation to deduce a good title.

It seems to be generally acknowledged, that a condition restraining a purchaser from requiring the production of the title anterior to a certain period, does not preclude him from shewing an actual defect in such anterior title. See *Shepherd* v. *Keatley*, 1 Cromp. Mees. & R. 117; *Edwards* v. *M'Leay*, G. Coop. 308. Whether such a condition would protect the vendor from liability in regard to a defect known to him, is not quite clear. If there be no such restrictive stipulation in the contract, it is clear that the vendor's responsibility, even after the completion of the contract, is not necessarily limited to the covenants in the conveyance; for, if he have concealed a fact which affected the validity of the title, this is a fraud against which, it seems, equity will give relief.

Defect known to vendor.

As to sales with a defective title.

The practical conclusion from the authorities seems to be, that a person, who sells with a title which he knows to be defective, ought not to content himself with declaring that he will not be called upon to produce the title for the period in which such defect arises, but should, moreover, stipulate that he shall not be considered as answerable for any defects of title which may be discovered. A stipulation of this kind might be somewhat alarming to purchasers, but honesty requires that a vendor, who sells with the knowledge of a defect, should thus far open the eyes of the person with whom he deals. Trustees, who sell under such circumstances, cannot exercise too much caution, lest they should render themselves liable to refund the purchase-money, which merely passes through their hands, in the course of its destined application, for the benefit of other persons. But in general a vendor cannot be rendered amenable for the consequences of a misrepresentation made by him in ignorance, and therefore without any fraudulent intention.

Vendors not liable for unintentional misrepresentation.

As to restraining purchaser from requiring evidence of facts anterior to a given period.

Another point deserving consideration in framing conditions of sale, is, whether the purchaser should not be restrained from calling for proof of extrinsic facts, as heirship, intestacy, death, &c., which are recited or taken notice of in deeds of a certain antiquity. [As to this, vide ante, Vol. 1, p. 120. Care should be taken, before this is done, to ascertain that the recitals or statements in the title-deeds are all unambiguous and consistent with each other, for any inconsistency of statement as to a particular fact, would, of course, amount to a deficiency even of such evidence as by the condition the purchaser is entitled to have, and would give him a right to call for

CONDITIONS OF SALE.

the ordinary evidence of that fact. Vide infra, p. 58. It may be doubted, also, considering the rigour with which restrictive conditions of sale are construed as against the vendor, whether, unless the language of the condition clearly expressed such an intention, it would be extended to bind the purchaser to accept recitals as evidence of conclusions of law. Whether, for example, under a condition that all recitals of facts and matters of pedigree, in deeds of twenty years old or upwards, should be sufficient evidence of the facts and matters recited, a purchaser would be bound to accept a mere recital that J. S. was the heir-at-law of E. T., as evidence of that fact, which, it will be observed, is something more than a matter of pedigree, being a conclusion of law, often not of easy determination, from circumstances which alone are strictly matters of pedigree; for, under the same pedigree, J. S. may be the heir-at-law of E. T. as to one estate, and not his heir as to another. The proper construction of a condition making recitals evidence of the facts and matters recited, would seem to be, that the recitals must state every fact and matter which, in the absence of such a condition, counsel advising on the title would require to be stated on the abstract, and to be proved, in order to enable him to draw the required conclusion. When it is considered how very seldom a recital of an heirship, unless it be of the simplest character, (as that A. was the eldest son of B.), contains a complete statement of the pedigree and other matters necessary to support such a conclusion, the expediency of framing conditions of this nature in a more special manner than is usual will be apparent. See forms infra, pp. 27, 60.]

As to the destination of title-deeds.

The destination of the title-deeds is a subject to which the attention of a person preparing conditions of sale will necessarily be directed. If deeds in the vendor's possession relate exclusively to the estate offered for sale, or to any one of several lots into which it is divided, he has nothing to do but to hand them to the purchaser, and no special stipulation is necessary. This, however, is often not the case. The deeds either relate to other property which is not intended to be offered for sale, or is comprised in some other lot at such sale, or which the vendor has sold on some former occasion, when he covenanted to produce the deeds to the purchaser. In the first of these cases, it should be stipulated that the vendor shall retain the deeds, on his covenanting to produce them at the purchaser's expense. In the second, it is usually provided, that the deeds shall be given up to the largest purchaser, on his entering into covenants for their production, with the other purchasers, at the expense of the latter. And provision should also be made for the event of any

lot remaining unsold. In the third and last of the several cases supposed, the only obstacle to the delivery of the deeds is the covenant already entered into for their production; and this is so little regarded in practice, that nothing is more common, than for a person, who has, on the sale of part of his estate, retained the title-deeds, covenanting absolutely for their production on the sale of the remainder, to deliver up the deeds to the purchaser, without taking the slightest precaution against the effect of his former covenant, which he has thus deprived himself of the means of performing. The hazard attending this course is obvious. If the covenantor be called upon to produce the deeds, in pursuance of his covenant, he is totally unable to comply, unless he can accomplish it through the favour of the person to whom he has delivered the deeds, and whom he has laid under no obligation to produce them. The covenantor, failing to perform his covenant, is of course answerable to the covenantee for any extent of damage he may have sustained by the non-production of the deeds, and which, in some cases, might be very considerable. Such actions are certainly not common, which in some degree accounts for, though it does not warrant, the total neglect of precaution. Suits to enforce the production of deeds would be more frequent, were it not that the arrangements for the production of them are usually effected through the solicitors of the parties, who from professional courtesy, and because the furnishing copies of deeds in their possession is a source of emolument, generally produce the deeds, and give copies, without rigidly scrutinising the applicant's right to demand them, unless there is reason to apprehend danger to their client's interest, by the exposure of the contents of the deeds; and even then, if there is a covenant for their production, the reluctance to produce them must yield to the obligation. If these facilities did not exist, the inconvenience attending the present practice would be sorely felt; and even now, a vendor should not be advised to part with deeds, which he has covenanted to produce, without obtaining from the person to whom he delivers them a covenant for their production, and thereby securing to himself the means of performing his own engagement; or (which is much better) he should endeavour to prevail upon his covenantee to cancel the existing deed of covenant, and in its stead to accept the covenant of the person to whom the deeds are about to be delivered.

Danger of parting with deeds after having covenanted to produce them.

In the case of trustees, it is usual to insert a proviso in covenants for the production of title-deeds, making them void in case the covenantor shall part with the deeds, and shall procure the person to whom they are delivered to enter into a similar covenant. And, in

As to qualifying trustees' covenants to produce deeds.

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strictness, every covenant, even by a beneficial owner, should be qualified in a similar manner, as he seldom intends to retain the deeds longer than he holds the property. It is doubtful, however, whether a purchaser, without an express stipulation, would be bound to accept of a covenant so limited, particularly if the expense of the substituted covenant were to be thrown upon him; and as such substituted covenant ought, upon the same principle, to contain a similar qualification, the expense would be interminable, as a similar operation must be gone through at every successive transfer of the property, and consequently of the deeds. A person, whose portion of the property to which the deeds related was not large, would probably forego the advantage of having any covenant for production, rather than purchase it upon such terms; and a covenantor, who had to find out the persons for the time being interested in the property under the covenantee, and give them notice, (which at least he would be bound to do), that he was about to part with the deeds, in order that they might tender a deed of covenant to the new custodian of the deeds, would have no enviable task. Such are some of the inconveniences attending the state of the law respecting title-deeds, and they were justly urged by the advocates for the establishment of a general registry, recently under the consideration of Parliament, as strongly illustrating the necessity of making more effectual provision than at present exists for insuring the preservation of, and free access to, documents of title. How far this advantage would be outweighed by the many evils necessarily attendant on such a measure, is a question on which the opinions of professional men are divided, and which this is not the proper place to discuss. The writer's aim is rather to consider by what means the evitable inconveniences, resulting from the existing system, can be best avoided. The precaution to be suggested in the present case, is, that, in preparing conveyances of property, whether for the purposes of sale, mortgage, or settlement, care should be taken to avoid, as much as possible, including in the same deed several properties, which, at a future period, are likely to be held by distinct proprietors; but rather to have a separate conveyance, mortgage, or settlement of each property. When this is practicable, the advantage attending it, in regard to future dealings with the property, is cheaply purchased by the cost of an additional deed (*a*). The

Inconvenience of conveying several properties by the same instrument.

(*a*) The alteration in the scale of stamp duties has diminished the motive to the plan here condemned, and, as a mortgagor is not allowed to redeem one mortgage while another mortgage loan actually due remains unpaid, the mortgagee's security is not materially improved by his having the entire pro-

practice of including several estates in the same mortgage much prevails, and is often productive of great inconvenience. If part of the property happens to be sold while the mortgage subsists, the mortgagee is of course a necessary party to the conveyance, and is required to covenant for the production of the mortgage-deed, which he declines to do, unless with a restriction confining the covenant to the period of his continuing to be mortgagee, which the purchaser is not bound to accept, (see 1 Sim. & Stu. 451): or, if he enters into an absolute covenant, he alleges this covenant as a ground (which it fairly is) for claiming to retain the mortgage-deed when his mortgage is paid off; and the mortgagor is obliged either to submit to such retention, or to procure the covenantees to accept his (the mortgagor's) covenant, in exchange for that of the mortgagee. In a case that recently occurred, in which a mortgagee had, at the instance of the mortgagor, joined in the conveyances of numerous portions of the property to purchasers with whom he had covenanted to produce the deeds, the mortgagor was obliged, in order to induce the mortgagee to deliver up the deeds, on the liquidation of the mortgage-debt, to go round to all these purchasers, and prevail upon them to exchange the mortgagee's covenant to produce for a similar covenant by himself.

Inconvenience of including several estates in the same mortgage.

Whether a person who has the possession of title-deeds can be compelled to produce them at the instance of the persons interested in the property to which they relate, is vexata quæstio. Even if it be clear that an equitable right to call for the production of the deeds exists, it is equally clear, that a purchaser is not compellable to rely upon it, but is entitled to a covenant for the production of all deeds material to the title, which are not placed in his possession; and the circumstance that he cannot have either the deeds or such a covenant, affords a sufficient ground for resisting the performance of the contract (*a*). *Barclay* v. *Raine*, 1 Sim. & Stu. 449.

Whether there is an equitable right to enforce the production of deeds independently of contract.

If a person purchases property which has been leased in the same deed with other lands, he is entitled to require that the counterpart be deposited in the hands of a third person for the benefit of himself and the other lessors. Thus, in *Shore* v. *Collett*, G. Coop. 234, certain estates were sold by auction, and it was stated in the particulars of sale, that the premises were on lease: and that the lease

Purchaser held to be entitled to have counterpart of lease deposited.

perty charged with the entire loan. It is true, that this doctrine only applies to mortgage-debts over-due, but how rarely is such a debt paid off on the day appointed!

(*a*) As to enforcing the contract where the deeds have been destroyed, vide *Bryant* v. *Busk*, 4 Russ. 1; ante, Vol. 1, p. 99.

CONDITIONS OF SALE.

Shore v. *Collett.*

contained covenants to repair and deliver up the premises in proper repair at the end of the term. It turned out, that the counterpart of the lease was in the possession of the devisees of a Mr. Foskett, who was seised in fee of an undivided share in the demised property when the lease was granted, and whose devisees had since received an allotment in lieu thereof, on a partition of the property. The Master, in his report upon the title, stated, that the purchaser, having required an attested copy of the lease, with a covenant for the production of the counterpart, the vendors had applied to Mr. Foskett's executors, and requested them to deposit the counterpart in the hands of some banker, in the names of four or five of the persons who were, or might be, interested in it; which they had declined to do, but had enrolled it in the Common Pleas for safe custody. The Master then reported, that it appeared to him that the plaintiffs had not then acquired to themselves the means of assuring to the defendant the production of the counterpart of the lease, or any sufficient evidence of its contents; though he considered this as not raising an objection to the title. To this report, the defendant excepted, upon the ground that the Master ought to have reported that the objections were valid objections to the title. These exceptions were overruled by the Vice-Chancellor. The point was afterwards brought before Lord *Eldon*, when his Lordship said, he was of opinion that the counterpart of the lease not being in the possession of the plaintiffs, was not an objection to their title. It was in the possession of one of the parties to the partition. No doubt the parties entitled to the other shares would be entitled to the production of the counterpart of the lease, in order to enable them to proceed against the tenant, if necessary. *But, unless the deed was deposited, he would not compel the purchaser to take under one of the lessors.* It would be too much to put the purchaser to the necessity of filing a bill from time to time to have the counterpart delivered to him as often as he might want it.

Vendor bound to furnish attested copies.

Every contract for sale now contains, as a matter of course, a stipulation that the purchaser shall be at the expense of attested copies: otherwise, the vendor is bound to furnish attested copies of all deeds which are not delivered up; *Boughton* v. *Jewell*, 15 Ves. 176; and this, where they are numerous, occasions a heavy expense, especially if the estate has been sold in many lots to different purchasers (*a*), for each purchaser would be entitled to copies. In a case where an estate had been sold in 144 lots, Lord *Eldon* was of opinion,

(*a*) I am not aware that the rule has ever been carried so far as to entitle a person purchasing several lots to a set of copies for each lot.

that each purchaser was entitled to copies; observing, however, that purchasers have set a value on these attested copies which does not belong to them. They are waste paper upon an ejectment, unless between the parties themselves. *Dare* v. *Tucker*, 6 Ves. 460.

For what period they should be furnished.

But it is found, that the anxiety of purchasers to be furnished with attested copies is considerably diminished when the expense is to be borne by themselves, and not unreasonably, since they can always procure such copies under the covenant for production, upon similar terms. It is observable, that in *Dare* v. *Tucker*, Lord *Eldon* appears not to have required copies to be supplied of all the deeds, "but only so far back as to make a title;" meaning, no doubt, a sixty-years' title. It may be inferred from this remark that his lordship considered that a purchaser was entitled to have an abstract of such only of the vendor's title-deeds as embraced the period in question. (On this point vide ante, Vol. 1, p. 62).

Copies of instruments on record.

The rule entitling the purchaser to attested copies at the vendor's expense does not apply to instruments on record, [or, it seems, to copies of court rolls]; *Campbell* v. *Campbell*, 2 Sugd. Vend. 119, 10th ed.; [See *Cooper* v. *Emery*, 8 Jurist, 181; 10 Sim. 609]; though, even of these, it may sometimes be necessary for the vendor to obtain copies, for the purpose of enabling the purchaser to ascertain the correctness of the abstract. This observation applies particularly to wills, as the officers of the Prerogative Court will not allow any copy or abstract to be compared with the original. [In *Cooper* v. *Emery*, Lord *Lyndhurst* said, "Another question is whether the purchaser is entitled to a covenant for the production of copies of court rolls. If the parties have them in their power, they are bound to produce them; but if not, purchasers are not entitled to a covenant, as they may resort to the rolls themselves. That is quite sufficient for their security, and experienced conveyancers confirm this opinion. With regard to deeds of bargain and sale, if it be a deed of bargain and sale inrolled under the statute, it falls within the same principle as the copies of court rolls. If the vendor has not possession of the deed, I do not think the purchaser is entitled to a covenant for production of a bargain and sale inrolled. He may have access to the inrolment, and, by the stat. 9 Anne, c. 18, a copy is made evidence. It therefore falls within the same rule. I say, with great deference to the opinion of the Vice-Chancellor, that I do not think a purchaser is entitled, as a matter of course, to a covenant for the production of a deed of bargain and sale, if it is within the statute. There must be an inquiry as to what copies of court rolls and deeds of bargain and sale the vendor has in his possession; and he must

Cooper v. *Emery*.

Purchaser not entitled to covenant to produce enrolled deeds or copies of court rolls.

CONDITIONS OF SALE.

produce all deeds within sixty years, or which are so connected with those within that period, that the title would not be complete without them." When the deed is inrolled, not under any statutory provision, but for safe custody merely, the above decision negativing the purchaser's right to a covenant for production will not apply, the inrolment not being evidence against strangers, (*Shore* v. *Collett*, ante, p. 7); but until the foundation of a purchaser's right to attested copies of deeds not inrolled is satisfactorily explained, it would be scarcely safe to say, that the rule acted upon in *Campbell* v. *Campbell* does not extend to deeds inrolled for safe custody merely. Since the decision in *Cooper* v. *Emery*, it seems to be clear at least, that the case of *Campbell* v. *Campbell* is an authority against the vendor's liability to furnish attested (and stamped (*a*)) copies of the copies of court roll; and in *Cooper* v. *Emery*, it was not contended that he could be called upon to procure stamped copies signed by the steward. (See *Whitbread* v. *Jordan*, 2 You. & C. 303; ante, Vol. 5, p. 485; a case which seems to have been deprived of its value as an authority by the doctrine in *Cooper* v. *Emery*.) How far this conclusion can be supported on principle, may be questioned. A purchaser is in strictness entitled to the title-deeds themselves, and the vendor is only excused from producing and delivering them, by shewing that he cannot do so. Whatever the vendor can do for the security of the purchaser, he is bound to do, and that at his own expense. If, therefore, the vendor is not in possession of copies of court-rolls which he can deliver to the purchaser, may he not be required to procure stamped copies taken from the original rolls, which will be available in evidence, (*Doe* d. *Cawthorn* v. *Mee*, 4 B. & Ad. 617; *Rowe* v. *Brenton*, 3 Man. & Ry. 297), and not, according to what seems to be the general impression and practice, (see Coventry's Conv. Ev. 159; 2 Sugd. Vend. 120), copies of the copies delivered in the first instance by the steward, which secondary copies would of course not be admissible in evidence? Such copies from the original roll, it is clear, the steward would be obliged, if not to make and sign, at least to allow to be made, notwithstanding the existence of the first set of copies. (*Rex* v. *Lucas*, 10 East, 236; *Rex* v. *Tower*, 4 Mau. & S. 162; 4 Taunt. 162: *Ex p. Hutt*, 7 Dowl. P. C. 670. See Reg. Gen. H. T. 2 W. 4, 2 Cr. & J. 197). If the steward's copy is lost, he would no doubt be bound to furnish another.

As to deeds inrolled for safe custody merely.

Whether the vendor must procure copies of court rolls in every case.

(*a*) [See the enactments in the General Stamp Act, relating to copies of deeds and other instruments, stated in the note on stamps on conveyances, infra.]

The difference between the steward's copy, and any other copy, is, that the former is admissible per se, without a further proof of the steward's signature, except perhaps in recent cases, for as it is part of the steward's duty to deliver these copies to the tenants, they are admitted in evidence upon the same principle as the chirograph of a fine, and certificate of inrolment of a deed; (*Appleton* v. *Lord Braybrooke*, 6 Mau. & S. 38); and therefore it seems that proof of the steward's handwriting should not be required. (*Rowe* v. *Brenton*, 3 Man. & Ry. 296. See *Compton* v. *Chandless*, 4 Esp. 18; Phill. Ev. 640, n., 8th ed.: *Snow* v. *Cutler*, 1 Keb. 567: *Lee* v. *Boothby*, Id. 720: *Doe* d. *Williams* v. *Lloyd*, 1 Scott, N. R., 503). After thirty years, a copy without the steward's signature has been admitted in evidence. (*Dean and Chapter of Ely* v. *Stewart*, 2 Atk. 44. See *Doe* d. *Goodwin* v. *Spray*, 1 T. R. 466). There seems to be an objection in some manors to grant more than one set of copies. (See *Whitbread* v. *Jordan*, 1 You. & C. 303.)]

[For other points as to conditions of sale, see the notes to the following precedents, passim, and ante, Vol. 8; and see some valuable remarks by Mr. Hayes, Introd. to Conv. Vol. 2, p. 203.]

PURCHASE DEEDS.

PRECEDENTS.

1. CONDITIONS OF SALE OF LEASEHOLDS.

1. ORDINARY CONDITIONS *of* SALE *of* LEASEHOLD PROPERTY (*a*).

Biddings.

THAT the highest bidder shall be the purchaser; and if any dispute should arise between two or more bidders, the premises shall be immediately put up again and re-sold.

II. That no person shall advance less than 5*l.* at each bidding, or retract his or her bidding (*b*).

Deposit.

III. That the purchaser shall pay down immediately into the hands of the auctioneers (*c*), a deposit of 20*l.* per cent. in

Time for completion.

part of the purchase-money, and sign an agreement for payment of the remainder on or before the —— day of —— next, from which time he will be entitled to the rents and profits (*d*); all outgoings to be cleared by the vendor to that

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(*a*) The length of the term, the amount of the rent, &c., are usually inserted in the descriptive particular, and do not appear in the conditions.

Bidding may be retracted.

(*b*) Without a stipulation to this effect, a bidder may retract his bidding at any time before the hammer falls; it being an offer only, which is not binding until its acceptance by the vendor. *Payne* v. *Cave*, 3 T. R. 148. But in contracts relating to land, the purchaser is not bound until he has signed the contract. [See *Malins* v. *Freeman*, 2 Keen, 25, ante, Vol. 1, p. 321.]

(*c*) Or,

"of [*solicitor*] the vendor's solicitor,"

which is a more usual provision in the country.

(*d*) If the premises are untenanted, instead of

"rents and profits," say—"possession."

period; but if, from any cause whatever, the purchase shall not be completed by the said —— day of ——, the vendor shall receive from the purchaser interest at the rate of 5*l.* per centum per annum on the remainder of the purchase-money from that day until the purchase shall be completed. 1. CONDITIONS OF SALE OF LEASEHOLDS.

IV. That the purchaser shall have a proper assignment of the premises at his own expense, on payment of the remainder of the purchase-money; but he shall not be entitled to call for the production of the lessor's title (*e*). The lease by Assignment. Title.

A vendor, however, should be cautious in parting with the possession before he receives the purchase-money. If he retains the possession, it seems to be rather unfair, though it is by no means uncommon, to oblige the purchaser to pay interest, on account of delay in the completion of the contract, "from whatever cause arising," possibly the vendor's own neglect to produce his title, or perform some other part of his duty. In such case the condition should go no further than to require the purchaser to pay interest during a delay occasioned by himself. It would then run thus—

"Possession to be delivered to the purchaser on the completion of the purchase; but if any delay shall arise in such completion, by reason of any act or default of the purchaser, such purchaser, though not entitled to the possession, shall be bound to pay interest at the rate of £—— per cent. per annum on the residue of his purchase-money, from the said —— day of ——."

These observations of course apply much more forcibly where the vendor derives a benefit from the possession than where the possession is vacant. In the former he would, in the case above supposed, if entitled to interest under the conditions, actually profit by his own wrong. In the latter case, though the loss occasioned by the vendor's own delay is, unfairly enough, thrown upon the purchaser, yet the vendor is not himself a gainer, the premises being unproductive to him.

Sometimes it is provided, in conditions of sale, that the purchaser shall be at the risk of fire, and other casualties, from the time of sale. But such a provision is unnecessary; the general rule being, that the purchaser, from the time of entering into the contract (see 6 Ves. 352, 7 Ves. 274), bears the risk of accidents. Purchaser at the risk of fire, &c., from the time of entering into the contract.

(*e*) If the premises are held under a renewed lease expressly granted in consideration of the surrender of a former lease, add—

"nor shall require the production of or the deduction of the title to any surrendered lease which is referred to in the subsisting lease." Surrendered lease referred to, not to be required to be produced.

Without a stipulation to this effect, the production of the surrendered lease might be required by the purchaser, the reference to it being notice to him of its contents. Vide ante, Vol. 1, p. 69. And by parity

1. CONDITIONS OF SALE OF LEASEHOLDS.

which the premises are held contains the usual lessees' covenants to pay the rent, to keep the premises in repair, with a covenant to insure against fire, and not to exercise any trade or business on the premises (*f*).

Auction duty.

V. That the auction duty of 7*d.* in the pound shall, immediately after the sale, be paid to the auctioneers by the purchaser.

Compensation for errors.

VI. That if any error to the prejudice of the purchaser shall appear to have been made in the description of the property, or of the vendor's interest therein, such error shall not vacate the sale; but the purchaser shall accept such compensation (*g*) as shall be fixed by two persons, one to be chosen by each party, or by their umpire, whose decision shall be final between the parties.

Penalty.

VII. That if the purchaser shall neglect or fail to comply with the above conditions, the deposit-money shall be for-

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of reason, if such lease contained, as it probably would, a similar reference to a prior lease, the prior lease must also be produced, and so on to the original lease. With this requisition, it is often not in the power of the vendor to comply, as the surrendered leases are given up to the lessor. [As to the vendor's liability to shew the lessor's title, vide ante, Vol. 1, p. 70, *Hall* v. *Batty*, 5 Scott, N. R., 508. The above stipulation does not preclude the purchaser from proving aliunde that the lessor had no title. *Shepherd* v. *Keatley*, 1 C. M. & R. 117; see *Spratt* v. *Jeffery*, 5 Man. & Ry. 188, 10 B. & C. 249; *Warren* v. *Richardson*, Younge, 1; *Haydon* v. *Bell*, 1 Beav. 337. And if the lease, which is the subject of sale, is itself an under-lease, there must be nothing in the conditions or particulars, in the slightest degree suggesting that such lease is derived immediately from the freeholder. See *Adams* v. *Lambert*, 2 Jur. 1078.]

(*f*) It may be advisable to add,

Evidence of performance of covenants, &c.

"and the production of the receipts for the ground rent to the —— day of —— shall be accepted as sufficient evidence of the due performance and observance of all the covenants, clauses, and conditions in the original lease on the lessee's part; and no objection shall be made, on account of any variance between the covenants and conditions in the original lease, and any under-lease or agreement with any tenant."

As to errors of description.

(*g*) [See *Dykes* v. *Blake*, 6 Scott, 320: *Flight* v. *Booth*, 1 Scott, 190]. Frequently it is provided that the vendor, as well as the purchaser, shall have compensation for any error of description. This, however, seems hardly fair, as the mistake arises from the negligence of the vendor, and the effect of giving the vendor compensation for any excess of quan-

feited; the vendors shall be at full liberty to re-sell the said property, by public or private sale, without previously tendering an assignment (*h*) to the purchaser; and the deficiency, if any, together with all charges attending the same, shall be made good by the defaulter at this present sale, and be recoverable by the vendor as and for liquidated damages (*i*).

1. CONDITIONS OF SALE OF LEASEHOLDS.

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tity, is to make the purchaser buy more than he contracted for. A man who has bought ten acres might be compelled to take twelve acres; or one who has bought a lease of forty years, to take a lease of sixty years at a proportional advance of price. [See *White* v. *Cuddon*, 8 Cl. & Fin. 766].

(*h*) These words are unnecessary, though usual, as the vendor is not in any case bound to tender a conveyance. *Webb* v. *Bettel*, 1 Lev. 44; *Baxter* v. *Lewis*, 1 Forr. 61; *Price* v. *Williams*, 1 Mee. & W. 6; see 5 B. & Ad. 742; *Poole* v. *Hill*, 6 Mee. & W. 835; 1 Sugd. Vend. 10th ed. 374.

Vendor not bound to tender conveyance.

(*i*) If the purchaser fails to perform his part of the contract, the vendor may, under this condition, re-sell the property, and recover the deficiency from the purchaser; or if he has become bankrupt, may prove it against his estate. (Ante, Vol. 8). In none of the cases does any attempt appear to have been made to claim the deposit as forfeited. This part of the stipulation seems to be a nullity. See 1 Sugd. Vend. 10th ed. 65.

Vendor may re-sell, and claim the deficiency.

2. CONDITIONS *of* SALE *of* LEASEHOLDS *held under* ONE LEASE, *and offered for sale in* TWO LOTS (*a*).

2. CONDITIONS OF SALE OF LEASEHOLDS.

THAT the highest bidder shall be the purchaser, and if any dispute shall arise as to the last or best bidder, the lot in dispute shall be put up again and re-sold.

II. That no person shall advance less than 5*l.* at each bidding, or retract his or her bidding.

III. That each purchaser shall pay immediately to the auctioneer one moiety of the auction duty, and a deposit of 20*l.* per cent. on the amount of his or her purchase-money, and sign an agreement for payment of the remainder on or before the —— day of —— next, all out-goings to which

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(*a*) [As to the liability of one purchaser to perform his contract in the absence of the other, see *Paterson* v. *Long*, 7 Jur. 1049.]

2. CONDITIONS OF SALE OF LEASEHOLDS.

time will be cleared by the vendors, and the respective purchasers be thenceforth entitled to receive the rents and profits; but should any delay arise, from any cause whatever, to prevent the purchases being completed at the time aforesaid, the purchasers shall pay interest at the rate of 5*l.* per cent. per annum, on the remainder of their purchase-money, from that time until the purchases respectively shall be completed, without prejudice, nevertheless, to the right reserved to the vendor by the last condition.

Interest.

Abstracts.

IV. That the vendor shall deliver abstracts of title, commencing with the indenture of lease under which the premises are held, dated the —— day of ——, to the respective purchasers, who shall prepare the requisite deeds of assignment at their own expense.

Attested copies.

V. That all attested copies which may be required shall be prepared by the vendor's solicitor, at the expense of the person requiring the same. The nature of the covenants in the lease may be ascertained by the perusal of a copy or abstract thereof, which will be produced at the place of sale (*b*).

Reference to covenants.

Bond of indemnity by purchaser.

VI. That each of the respective purchasers shall, on the completion of his purchase, at his own expense, execute to the vendor a bond for the sum of £——, conditioned for indemnifying the vendor against the rent and covenants of the lease, in respect of the premises purchased by and assigned to each such respective purchaser (*c*).

Covenants in the lease should be described, or an abstract furnished.

(*b*) As much uncertainty exists in regard to what are *usual* covenants in a lease, (vide ante, Vol. 4, p. 297), it is better not merely to describe the covenants as being of this character, but either to specify what they are, or, which is more convenient where the covenants are numerous, give the purchaser an opportunity of informing himself upon the point, by the perusal of a copy or abstract of the lease at or previously to the sale. This avoids disputes, which otherwise frequently arise, as to whether particular covenants (such as the covenants to insure against fire, not to underlet or exercise certain trades or *any* trade, &c.), do not impose obligations or restrictions of which the purchaser should have been apprized. [As to misrepresentation of the nature of the covenants where the vendor undertakes to state them, (which he is not bound to do, however unusual they may be, *Walter* v. *Maunde*, 1 Jac. & W. 181; *Pope* v. *Garland*, 4 You. & C. 394), see *Flight* v. *Booth*, 1 Scott, 190; *Van* v. *Corpe*, 3 Myl. & K. 269.]

(*c*) A covenant to this effect is frequently inserted in the deed of assignment, but as that deed is delivered up to the purchaser, a bond or covenant by a separate deed is to be preferred. (See a precedent of such a bond, ante, Vol. 4, p. 210). The object of the condition is to

2. CONDITIONS OF SALE OF LEASEHOLDS.

Apportionment of rent, &c.

VII. That inasmuch as both the messuages now offered for sale are included in one lease, subject to an entire rent of 18*l.*, of which rent it is intended that each of the said messuages shall bear one moiety, the purchaser of each lot shall enter into a covenant with the purchaser of the other lot for the payment and performance of his (the covenantor's) proportion of the rent and covenants, and give to such other purchaser a power of distress upon the premises purchased by the covenantor, as an indemnity against such proportion (*d*);

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provide at whose *expense* the additional instrument is to be executed, this being generally the principal point of dispute.

(*d*) See the precedent of a deed for carrying into effect this arrangement, ante, Vol. 4, p. 202.

As to the apportionment of the rent, and giving the assignees mutual powers of distress.

The present condition, and the precedent referred to, are adapted only to the simple case of an apportionment between two. In this case the person obliged to pay more than his share has merely to levy the excess upon the other. Where the number of assignees is more than two, the arrangement is rather more complex. In such case, the deed should either provide that an assignee, who has paid more than his share, shall levy the excess upon his co-assignees according to the respective shares only in which they are bound to contribute; or, if the assignee is entitled to distrain for the *whole* of *his* excess upon any one of the others, the deed should give the assignee thus distrained upon a similar remedy over against the others with respect to the excess levied upon him, and so on, toties quoties. The result in both cases in effecting an equal distribution of the rent is the same, but the former seems to be the preferable mode, because it produces a more complete equality in the distribution of the costs; for, as each successive distress is attended with costs, which are not borne by the persons who have already paid their proportion and availed themselves of their remedy, the effect is to give such persons an unfair advantage relatively to those who are subsequently called upon. Thus, if four messuages are built on a piece of ground which is demised at an entire rent of 20*l.*, and they are sold to A., B., C., and D. respectively, with an agreement that each is to bear 5*l.* of the rent, and cross powers of distress are given to them respectively in the manner suggested; if the lessor distrains upon A. for 20*l.*, A. would be entitled to levy on any co-assignee, (say B.), for 15*l.* and three-fourths of the costs he has paid to the lessor; and B. would be entitled to distrain upon C. not only for two-thirds of the sum levied upon him, but also for two-thirds of the costs of A.'s distress, in which A. does not participate; and C. would be entitled to levy one-half the sum paid by him upon D., *who would bear exclusively the costs of the distress made upon him.* It seems, therefore, more fair, that the claim of each assignee against the others should be restricted to their respective contributory shares. Of course, the inequality as to costs above noticed might be prevented, by making them leviable upon all the assignees,

2. CONDITIONS OF SALE OF LEASEHOLDS.

of which deed of indemnity two parts shall be executed, one for each of the purchasers, and the same shall be prepared at their joint expense.

Custody of lease, &c.

VIII. That the lease and assignments shall be delivered to the purchaser of the lot which shall be sold at the larger price, who shall enter into a covenant for their production with the other purchaser, at the expense of the latter; and if the price of the respective lots shall be equal, the purchaser of lot 1 shall have the privilege hereby proposed to be given to the larger purchaser.

Proviso if one lot unsold.

IX. That, if either of the lots shall remain unsold, then the vendor shall be considered as standing in the place of, and shall have the privileges which are hereby proposed to be given to, the larger purchaser (*e*), and shall concur with the purchaser in carrying into effect the seventh condition, but the whole expense of the indemnity deeds shall be borne by the purchaser.

Compensation for errors.

X. That if any error or misstatement shall be made in these particulars (*f*), the same shall not annul the sale, but a proportionate allowance, (the purchase-money being the measure

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as well those who have paid as those who have not; but this is rarely done.

Sometimes, where premises comprised in one lease are sold in several lots, instead of each purchaser taking an assignment of his part, it is provided, that one of the purchasers (usually the largest) shall take an assignment of the whole from the vendor, and grant under-leases to the others. (See the form, infra, p. 20, and see p. 64.) This, however, does not supersede the necessity of giving the under-lessees cross powers of distress, and seems, on the whole, to be a less eligible plan than that of assigning to the purchasers their respective proportions.

Vendor to have the option of delivering up the deeds.

(*e*) Sometimes a vendor, influenced by such considerations as have been suggested in a former place (vide ante, p. 5), may prefer delivering up the deeds, and taking, instead of giving, a covenant for their production. In such cases the following addition may be made to the condition:—

"Unless he should prefer delivering up the lease and assignments aforesaid to the purchaser, in which case he shall be at liberty so to do, and to call upon such purchaser for a covenant for their production at his expense."

(*f*) [As to the ambiguity which may arise from the use of the words "this particular," in the singular, namely, whether it is intended to refer to the particulars of the property, or merely to say "in this respect," see *White* v. *Cuddon*, 8 Cl. & Fin. 784.]

of value) (*g*), shall be made by the vendor or purchasers, as the case may require, such allowance or compensation to be ascertained by a reference in the usual way (*h*). 2. CONDITIONS OF SALE OF LEASEHOLDS.

XI. That if any purchaser or purchasers fail to comply with these conditions, the deposit-money paid by him or them respectively shall be forfeited, and the vendor shall be at full liberty to resell the lot or lots sold to such purchaser or purchasers, either by public auction or private contract, and the deficiency, if any, arising on such second sale, together with all charges attending the same, shall be made good by the defaulter or respective defaulters at this present sale, as and for liquidated damages; and it shall not be necessary for the vendor previously to tender assignments to the purchasers (*i*).

(*g*) This seems to be the true principle in ascertaining the amount of the compensation.

(*h*) As to the convenience of naming a referee, see an observation post, p. 54.

(*i*) As to this condition, see an observation ante, p. 15.

[3. SPECIAL CONDITIONS *on the sale of* LEASEHOLDS *by* EXECUTORS AND TRUSTEES. *The* PURCHASER *of the* LARGEST *of* SEVERAL LOTS *which are held* UNDER ONE LEASE, *to take an* ASSIGNMENT *of the lease, and execute* UNDERLEASES *to the other purchasers, at stipulated* APPORTIONED RENTS. 3. SPECIAL CONDITIONS OF SALE OF LEASEHOLDS BY TRUSTEES.

(*Conditions*, 1, 2, *and* 3, *ut ante, p.* 1, *or p.* 4.)

IV. THE vendors shall, at their own expense, deliver to each of the respective purchasers, within fourteen days after the sale, an abstract of their title to the lot or lots sold to him or her, such title commencing with the lease under which the property comprised in each lot is held by them; such lease shall in all respects be deemed and taken to be well granted, and the vendors shall not be called upon or required to show or to prove the lessor's title or any abstract thereof, and no objection shall be taken to the vendors' title by reason of the said lease comprising other premises, and the production of the last receipt for payment of rent by the vendors shall be deemed and taken as conclusive evidence of the due performance of all the covenants and agreements Title and evidence.

3. SPECIAL CONDITIONS OF SALE OF LEASEHOLDS BY TRUSTEES.

contained in the lease or leases under which the premises sold are respectively held, up to the date of such last receipt, and no proof shall be required from the vendors of the subsequent performance of any covenant or condition in such lease, unless and until the purchaser shall distinctly point out by writing under his hand, and vouched and signed by the person on whose information the objection may be founded, the time and circumstances of any breach thereof.

Evidence.

Expense of proofs.

The expense of and attending the procuring of all official, attested, and other copies of or extracts from deeds, wills, documents, certificates for redemption of land-tax, parish, or other registers, and of all other evidence not in the vendor's possession, as also the expense of and attending the registering, in the Middlesex Office, of any deed, will, or other documents, which may be required by the purchaser in support or manifestation of the vendors' title, or for verifying the abstract thereof or otherwise, shall be borne and defrayed by the purchaser requiring the same.

Vendors being trustees, to covenant only against incumbrances, and to produce probate.

V. The vendors, being executors and trustees, shall not be required to enter into any other covenants than the usual covenant that they have not encumbered, and the usual qualified covenant for the production of the probate of the testator's will (which will be retained by them), and of such deeds or documents in their possession, as are to be retained by them, nor be required to enter into any bond or bonds of indemnity or otherwise, nor be required to show or to prove the title, or obtain the concurrence of any cestui que trust interested in the proceeds of the sale, or to produce to the purchaser any policy of insurance against fire, other than the subsisting policy, or to produce the certificate or other evidence of the redemption of the land tax; nor shall any cestui que trust, or party interested in the proceeds of the sale, be required to enter into any covenants for the title or otherwise.

Concurrence of cestui que trust not to be required.

Fire insurance.

Land tax.

Apportionment of rent and indemnities.

VI. That, inasmuch as lots 1, 2, 3, 4, and 5, respectively, are held under one lease, if all the lots be sold, the purchaser of the lot which shall be sold at the highest or largest price shall take at his own expense an assignment of the said lease and the whole of the premises comprised therein, and shall be entitled to the possession of the deeds relating to such lot jointly with the other four lots, and such purchaser shall grant an underlease to the respective purchasers of the other lots, for the whole of the term granted by such original lease now to come and unexpired, (less by

three days) at a ground rent of 2*l.* per annum, as respects lots 1, 2, 3, or 4, respectively, and at a ground rent of 4*l.* per annum, as respects lot 5, subject to the same covenants and conditions as are contained in the said original lease, with the usual qualified covenant for the production of the original lease, and all mesne assignments, if any; and each purchaser shall execute a counterpart of his or her underlease, and each such underlease and counterpart thereof shall be prepared by the demising purchaser's solicitor, at the expense of the respective purchasers. But in case any of the said lots 1, 2, 3, 4, or 5, shall remain unsold, the purchaser of each respective lot which shall be sold, shall have at his own expense, from the vendors, an assignment of the lease in respect of the premises purchased by him or her for the remainder of the term, subject to the payment of such proportional part of the original ground rent of 12*l.* as is set against the lot in the particulars of sale, and shall (if required) execute a counterpart of such assignment, and in such assignment shall be contained a covenant by and on the part of the purchaser, his heirs, executors, administrators, and assigns, to indemnify the vendors, their heirs, executors, administrators, and assigns, and other the owners for the time being of the other portion of the premises comprised in such original lease, against all loss, costs, actions, damages, and expenses, occasioned by or on account of the non-payment of such proportional part of the said original rent or any breach or non-observance, or non-performance, of any of the covenants contained in such original lease in respect of the premises comprised in such assignment. And the original lease, and all other documents in the possession of the vendors, which relate to or comprise that and other property, shall be retained by them upon their entering into the usual qualified covenant to produce the same, to be added to the purchaser's assignment, or otherwise prepared at the purchaser's expense. And the purchaser of each of the said lots, on the completion of his purchase, may have at his own expense an attested copy of such original lease and other documents retained by the said vendors, or the party who, under this condition, will have the possession thereof (*a*).

3. SPECIAL CONDITIONS OF SALE OF LEASEHOLDS BY TRUSTEES.

Vendors to retain lease.

Attested copy.

VII. That every objection or requisition to or in respect of the title or the evidence thereof, shall be delivered in

Time for making objections, &c.

(*a*) [See observations, ante p. 17. The rent being small, there is no provision for giving powers of distress by way of indemnity.]

3. SPECIAL CONDITIONS OF SALE OF LEASEHOLDS BY TRUSTEES.

writing to Mr. ——, of ——, the vendor's solicitor, within ten days after the delivery of the abstract, and if not so delivered, the same shall (notwithstanding any defect in the abstract in respect of other matters) be waived, and the title considered as having been accepted to that extent, so that the purchaser shall be precluded from taking any objection or making any requisition, except within ten days after he shall have had notice thereof, and in this respect time shall be of the essence of the contract. Should a purchaser make or insist on any objection or requisition, and the vendors be unable or unwilling to remove or comply with the same, the vendors shall, notwithstanding any intermediate negotiations or offers respecting such objection or requisition, be at liberty, by notice in writing, to rescind the contract, and to return the deposit, without payment of any interest, damages, costs, or expenses, on any account whatsoever.

Power to rescind.

VIII. (*Proviso for errors of description, ut ante, p.* 18.)

IX. (*Penalty for default, ut ante, p.* 19).]

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4. CONDITIONS OF SALE OF LEASEHOLDS AND LIFE POLICIES BY MORTGAGEES.

[4. CONDITIONS *of* SALE *of* LEASEHOLDS *and* POLICIES *of* LIFE INSURANCE *by* MORTGAGEES.

EACH lot shall be put up at a sum to be fixed by the auctioneer; the highest bidder shall be the purchaser; and if any dispute shall arise as to the last or best bidder, the lot shall be put up again at a former bidding. One person will bid at the sale on behalf of the vendors.

II. No person shall advance less than 5*l.* at each bidding, or retract his bidding.

Deposit.

Auction duty.

III. Each purchaser shall, immediately after the sale, pay a deposit of 20*l.* per cent. of his purchase-money, and one moiety of the auction duty, into the hands of the auctioneer, and the purchaser of lot 1 shall sign an agreement for payment of the remainder of the purchase-money, on or before the —— day of —— next, all out-goings up to which time will be cleared by the vendors, and possession will be given on completing the purchase. The purchasers of lots 2 and 3 shall, immediately after the sale, sign an agreement for payment of the remainders of their respective purchase-monies on or before the —— day of —— next, all out-goings up to which time will be cleared by the vendors, and possession will be given on completing the pur-

Time of completion as to lot 1.

Possession.

Time as to lots 2 and 3.

chase. But should any delay arise, from any cause whatever, to prevent the completion of the purchase of any lot at the time specified, the purchaser shall pay interest at the rate of 5*l.* per centum per annum on the remainder of the purchase-money from that time until the purchase shall be completed. Interest.

IV. Within twenty-eight days from the day of sale, the vendors shall, at their own expense, make and deliver to every purchaser, or his solicitor, an abstract of the title of the vendor to the lot or lots purchased by him, and no purchaser shall be at liberty to make any objection to the title or requisition after the lapse of fourteen days from the delivery of any abstract that shall suggest such objection or requisition. Time for delivery of abstract. Time for making objections, &c.

V. The purchaser of lot 1 shall not be entitled to call for the production of the title of the persons by whom the original lease of the 1st January, 1834, was granted, or of the persons by whom, as lessors, the terms of the same lease were varied by the indenture of covenant of the 2nd October, 1838, nor to investigate or make any objection to such title (*a*). Lessors' title.

VI. The purchaser of lot 1 shall not require any other evidence that the rent and covenants and conditions reserved and contained by and in the said original lease of the 1st January, 1834, as varied by the said indenture of the 2nd October, 1838, have been paid and observed up to the completion of the purchase, than the production of the receipt for the rent up to the —— day of —— last. The conditions under which the property is held may be ascertained from an abstract or copies of the deeds above referred to, which will be produced at the sale, and may be inspected at the office of Messrs. ——, between the hours of 11, a. m., and 3, p. m., on the —— and —— days of ——. Evidence of observance of covenants. Notice of covenants, &c., in lease.

VII. With respect to the validity of the policy comprised in lot 2, the purchaser shall require no further evidence than the solemn declaration of Mr. ——, the assured, that when the policy was effected, he was in a good state of health, and of the (*b*) age mentioned in the policy, and the solemn declaration of Messrs. ——, that nothing has been done within their knowledge to vitiate the policy, and the production of the receipt for the premium last due. Evidence as to policy of insurance.

VIII. The purchaser of lot 3 shall require no further

(*a*) [If there is no doubt of the goodness of the lessor's title, these latter words should be omitted, as tending to damp the sale.]

(*b*) [If the age is admitted on the policy, as is frequently done, this may be omitted.]

4. CONDITIONS OF SALE OF LEASEHOLDS AND LIFE POLICIES BY MORTGAGEES.

evidence of the validity of the policy comprised therein, than such as is mentioned in the last condition, together with the solemn declaration of Mr. ——, that, at the time the policy was effected, he had an insurable interest in the life mentioned in the policy to the amount of £—— (*c*).

Assignments.

IX. On payment of the remainder of the purchase-money at the time and place above-mentioned, the several purchasers shall have proper assurances executed to them of the lots purchased by them respectively: but such assurances are to be prepared by and at the expense of the respective purchasers, and are to be tendered or left by them, on the said —— day of ——, at the office aforesaid for execution by the vendors.

Covenants.

X. The purchasers are not to require the vendors to procure their mortgagors, or any person claiming through their mortgagors, other than the vendors, to execute such assurances, or any of them. As the vendors are mortgagees, the purchaser of each lot shall not be entitled to any other covenants, except several covenants by the vendors that they have not incumbered the property.

Compensation for errors.

XI. If any mistake be made in the description of the property, or any other error whatever shall appear in the particulars of sale, such mistake or error, if capable of compensation, shall not annul the sale; but a compensation shall be allowed by or to the vendor, as the case may require,

Arbitration.

such compensation to be settled by two referees or their umpire, in manner following: that is to say, each party shall within fourteen days after notice of the mistake or error shall have been given, appoint one referee by writing; and the referees so appointed shall, before they commence their duty, appoint an umpire by writing; and the decision of such referees, if they agree, or of such umpire, shall be final. In case either party shall neglect or refuse to appoint an umpire within the time specified, the referee appointed by the other party shall make a final decision alone.

XII. (*Power to rescind contract, if deemed expedient, ut infra, p.* 26, *or p.* 61.)

XIII. (*Proviso for purchaser's default, ut ante, p.* 19).]

(*c*) [As to this, vide ante, Vol. 5, p. 302.]

[5. SPECIAL CONDITIONS *of Sale of* COPYHOLDS *in two lots.*

5. CONDITIONS OF SALE OF COPYHOLDS.

EACH lot shall be put up at a sum to be fixed by the auctioneer at the time of sale: no person shall at any bidding advance less than 5*l.*, or retract his or her bidding; and if any dispute shall arise as to the last or highest bidder for either lot, the same shall be put up again at some former bidding. Biddings.

II. The auction duty shall be paid by the vendors and purchasers in equal moieties. Auction duty.

III. Each purchaser shall, immediately after the sale, pay a deposit of 20*l.* per cent. on his purchase-money into the hands of the auctioneer, and sign an agreement for payment of the remainder on the 30th day of —— next, at the office of Mr. ——, solicitor, at which time and place the purchase is to be completed, and the purchasers to have the actual possession, or be let into the receipts and profits, of the respective lots purchased by them. All outgoings up to that time will be discharged by the vendors. Deposit. Time for completing.

IV. Within ten days from the day of the sale, the vendors will, at their own expense, make and deliver to each purchaser, or his solicitor, an abstract of the vendors' title to the lot or lots purchased by him, and will deduce a good title thereto, subject to these conditions. Abstract.

V. Upon payment of the remainder of the purchase-money at the time and place above-mentioned, the vendors shall execute a proper deed of covenant, and a surrender to the purchaser of each lot; but such deed to be prepared by and at the expense of the purchaser, and to be tendered or left by him on the said 30th day of ——, at the office aforesaid, for execution by the vendors. Conveyance.

VI. The estates mentioned in the particulars of sale are presumed to be correctly described; but should any error appear, the same shall not vacate the sale, but an allowance shall be made by the vendors or purchasers, as the case may require, in proportion to the purchase-money: such allowance to be determined by two indifferent persons, or their umpire, in the usual manner. Compensation for errors.

VII. If, from any cause whatever, either purchase shall not be completed on the said 30th day of ——, the pur- Interest.

5. CONDITIONS OF SALE OF COPYHOLDS.

chaser shall pay interest on the amount of his purchase-money remaining unpaid, after the rate of *5l.* per centum per annum, from that day until the purchase shall be completed, and shall from the same day be entitled to the rents and profits of the lot or lots purchased by him.

Time for making objections.

VIII. Each purchaser shall make his objections and requisitions (if any) in respect of the title to the lot purchased by him, and send the same to the said office of the said Mr. —— within twenty-one days from the day of the delivery of his abstract: and all objections and requisitions which shall not be made within the time specified, shall be deemed to have been waived, [notwithstanding any subsequent negotiation or attempt or offer by the vendor to remove such objection or comply with such requisition]; and an abstract shall be considered as complete in regard to any objection or requisition if it supply the information suggesting the same, although it may be defective in any other particular.

Power to rescind.

IX. If, from any cause whatever, either purchase shall not be completed on or before the said 30th day of ——, the vendors shall then, or at any time thereafter, (notwithstanding any intermediate negotiations, not being an express waiver of this condition), be at liberty either to annul or to enforce the contract for such purchase at their discretion; and in case they shall annul such contract, the purchaser shall have no claim on the vendors for the expenses of investigating the title, or for any other expenses, or costs, or damages.

Expense of evidence, &c.

X. The production and inspection of all deeds, court rolls, and copies of court rolls, evidences and muniments of title (if any) which are not in the possession of the vendors, and the expense of all journeys incidental to such production or inspection, and the procuring and making of all certificates, attested, stamped, office, or other copies of or extracts from any registers, court rolls, wills, or other documents, and of all declarations or other evidence as to identity, whether one of the matters mentioned in the condition be required for the verification of the abstract or for any other purpose, shall be at the expense of the purchaser requiring the same.

Custody of deeds.

XI. The purchaser of the largest lot in value shall, after the sale of both the lots, be entitled to the custody of such of the deeds and evidences of title as are in the vendors' possession, upon entering into the usual covenants with the purchaser of the other lot, for the production and furnishing of copies of the same. If either lot shall not be sold, the vendors shall

retain the said deeds and evidences, and enter into the usual covenants for the production and furnishing of copies of them; such covenants to be determinable on the vendors' parting with such deeds and evidences, and procuring the person to whom they shall be delivered to enter into the usual covenants for the production and furnishing of copies of them with the person or persons then entitled to the benefit of the vendors' covenants. The deeds containing any such covenants, whether original or substituted, to be prepared by and at the expense of the respective covenantees. 5. CONDITIONS OF SALE OF COPYHOLDS.

XII. Every recital or statement of any heirship, death, marriage, birth, or other matter of pedigree or heirship, (whether stated as a fact or as a conclusion of law), contained in any court roll, copy of court roll, deed, will, or other document dated twenty years or upwards prior to the day of sale, shall be deemed conclusive evidence of the fact or matter recited or stated. Old recitals to be evidence.

XIII. If either purchaser shall neglect or fail to comply with the above conditions, his or her deposit-money shall be forfeited to the vendors, who shall be at liberty to re-sell the lot, either by public auction or private contract, subject to any special or other conditions or stipulations: and the deficiency (if any) on such second sale, and all expenses attending the same, shall be made good by the defaulter at this sale, and shall be recoverable from him, after demand by the vendors or their solicitor, as and for liquidated damages, and it shall not be necessary to tender any deed, conveyance, or surrender to the purchaser.] Penalty.

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6. CONDITIONS *of* SALE *of a* FREEHOLD ESTATE, *where the* TITLE *is* NOT INVESTIGATED BEFORE *the* SALE (*a*).

(*Conditions* 1 *and* 2, *ut ante*, *p.* 22). 6. CONDITIONS OF SALE OF FREEHOLDS.

III. THAT the purchaser (*b*) shall pay to the auctioneer, immediately after the sale, a moiety of the auction-duty, and a

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(*a*) It is scarcely necessary to observe that *all* the stipulations introduced into this precedent are not exclusively adapted to such a case. Those only which authorize the vendor to vacate the contract are of this nature.

(*b*) [The stat. 17 Geo. 3, directs, that in case it is made a condition of sale that the auction duty shall be paid by the purchaser, the auctioneer is to demand payment of it, and, upon neglect or refusal to pay the Condition that purchaser shall pay auction duty.

6. CONDITIONS OF SALE OF FREEHOLDS.

deposit in the proportion of 20*l.* for every 100*l.*, of his or her purchase-money, and sign an agreement for payment of the remainder of such purchase-money on or before the —— day of —— next; and if, from any cause whatsoever, the purchase should not then be completed, the purchaser shall pay interest at the rate of 5*l.* per cent. per annum on the remainder of the purchase-money from that time, until the purchase shall be completed, without prejudice, however, to the vendor's right, under the last condition, to re-sell the estate under the circumstances therein specified, if he shall think fit. And, during the period of the payment of interest as aforesaid, the purchaser shall be entitled to receive the rents and profits arising from the said premises.

Interest.

Title—Attested copies—Evidence.

IV. That the vendor shall deduce a good title (*c*) to the premises sold, but the expense of all attested copies of deeds, and covenants for the production of the same, that shall be required, shall be borne by the purchaser, and the purchaser shall not be entitled to require evidence of any fact stated in any deed, will, or other document dated more than twenty-one years ago.

Power to rescind.

V. That if a valid objection shall be made to the title, within one calendar month after the delivery of the abstract, the vendor shall be at liberty to rescind the contract on returning to the purchaser his deposit (without interest,) and his moiety of the auction duty, in full satisfaction of the claims of such purchaser: but all objections to the title or requisitions relative thereto not made within the period aforesaid, shall be considered as waived (*d*).

Time for making objections.

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same, such bidding shall be null and void to all intents and purposes. Under such a condition as that in the text, the auctioneer may wait until the end of the sale before he makes his demand, and if a person bids, who, without the auctioneer's knowledge, acts merely as agent for the vendors, or for one of the vendors, to advance the sale, the vendors are personally liable to the auctioneer for the duty paid by the latter to the excise, after he has duly demanded payment from the agent. *Willson* v. *Carey*, 11 Mee. & W. 368. See S. C. 10 Mee. & W. 641.

Vendor must shew a title for sixty years.

(*c*) [The Lord Chancellor has recently decided, in accordance with the opinion advocated ante, Vol. 1, p. 59, that the Statute of Limitations, (3 & 4 Will. 4, c. 27), has not abridged the length of time during which a purchaser may claim to have a title established. *Cooper* v. *Emery*, L. C. 28th Feb. 1844 ; 8 Jurist, 181.]

Effect of condition enabling the vendor to rescind the contract, if a title

(*d*) [See a more complete form of this condition, ante, p. 26.] The object of the condition is, to exclude the purchaser's claim to be reimbursed his expenses in investigating the title, in case it proves to be defective, to which he would otherwise clearly be entitled. *Kirtland* v. *Pounsett*, 2 Taunt. 146 ; *Turner* v. *Beaurain*, 2 Sugd. Vend.

VI. That the purchaser shall have a proper conveyance,

6. CONDITIONS OF SALE OF FREEHOLDS.

cannot be made.

10th ed. 51*; *Page* v. *Adam*, 4 Beav. 269. It also prevents his claim to damages, as to which vide ante, Vol. 8.

The condition in the text should be inserted as a matter of course, when the vendor sells without a previous investigation of his title. Where such investigation has been made, and has disclosed a defect, the propriety of its introduction is more questionable, since, in such case, it is scarcely fair to put a purchaser to the expense of investigating the title, when probably, if he had been made acquainted with the facts, he would not have entered into the contract. Much, of course, would depend upon the nature of the objection, as a defect sufficient to render a title unmarketable may not endanger the enjoyment, or materially affect the value of the property.

Condition that vendor may rescind the contract, if evidence not in his possession is required.

Sometimes it is prudent for a vendor to arm himself with a still more considerable power, namely, to rescind the contract in case evidence should be required which is not in his possession; for it may happen, in a very small purchase, that the expense of procuring evidence, in support of the title, would be nearly equal to the purchase-money. The condition may then be as follows:—

"That if the purchaser shall be dissatisfied with the title deduced by the vendor, or shall require evidence in support thereof, not in the possession of the vendor, the vendor shall be at liberty to rescind the contract on repaying to the purchaser the sum paid by way of deposit, without interest, in satisfaction of all claims and demands whatsoever."

But though a condition to this effect may be desirable, where the vendor is obliged to sell without a previous examination of the title, yet the latter is much the more satisfactory course, as the title may prove, upon examination, to be free from all objection; in which case, an unfounded suspicion (for such conditions have always the effect of creating suspicion) will have been produced respecting the title. [Vide infra, p. 62 n.]

Declaration that contract shall be void if a good title cannot be made, how construed.

Where the terms of the condition are, that, in case a good title cannot be made, the contract shall be void, the question has sometimes been raised, whether this absolutely vacates the contract, or leaves the purchaser at liberty to accept the title if he pleases; as to which, vide ante, Vol. 8. The modern cases suggest the propriety of explicitly declaring the intention of the parties on the point; and, therefore, to the condition in the text, may be added—

"but the purchaser, notwithstanding this condition, shall be at liberty to accept the defective title if he thinks proper."

* Where a vendor has incurred expense in endeavouring to remove objections to a title which a purchaser has advanced, and the purchaser afterwards makes a further objection, which is insuperable, and the contract is consequently abandoned, he ought, it seems, to allow the vendor the expenditure incurred in the attempt to perfect the title before the fatal objection was advanced. See *Deverell* v. *Lord Bolton*, 18 Ves. 515. [See, however, infra, p. 62 n.]

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in fee simple (*e*), at his own expense, according to the third condition; and the vendor shall, at his own expense, procure all persons having any outstanding estates or interests as mortgagees, trustees, or otherwise, to join therein (*f*).

Costs of conveyance.

VII. That the auction duty of seven-pence in the pound shall be paid by the vendor and purchaser in equal proportions immediately after the sale.

Compensation for errors.

VIII. That if any mistake be made in the description of

If the contrary be intended, say—

"And it is declared that this condition shall enable the vendor to insist upon the abandonment of the contract on account of his want of title, though the purchaser shall be willing to accept it."

(*e*) [In the absence of any specific description or stipulation, a sale of freehold lands is understood to mean the fee simple. See *Western* v. *Russell*, 3 Ves. & B. 187; *Bower* v. *Cooper*, 2 Hare, 408.]

Who is to bear the expense of getting in particular interests, &c.

(*f*) This condition anticipates and serves to obviate a complaint sometimes made by purchasers, that the length, and consequently the expense, of their conveyances is increased by the multiplicity of interests into which the property has been carved out. Though this certainly is rather a hardship upon a purchaser, and is especially felt to be such in the case of small purchasers, yet it is conceived that he cannot insist on the vendor procuring the discharge of incumbrances by a separate deed, or on his taking any other steps to simplify the title for the convenience of the purchaser. A rule, entitling him to this, must go the length of requiring that, in every case, the vendor should procure the entire legal and beneficial interest in the property to centre in himself or some other individual, which would be a very inconvenient and quite a novel doctrine. A purchaser might, with equal reason, complain of the additional expense occasioned to him in investigating the title by reason of its complexity. In both cases the answer to the complaint is, that he has purchased without inquiry on a point in which the vendor was not bound (if he were able) to afford him any information, and must, therefore, be considered as voluntarily incurring the risk resulting from such ignorance. The writer remembers a case in which, owing to the complicated state of the title, the expense of the conveyance was equal to nearly one-fourth of the purchase-money, which was under 200*l*.

[The vendor's solicitor sometimes claims the right of preparing the separate deeds by which incumbrances are discharged; this he is of course entitled to do, if the incumbrances are discharged by the vendor himself, and the deeds can be produced to the purchaser, executed, before he pays his money, but if the incumbrances are to be paid out of the purchase-money, it is conceived that the purchaser is entitled to prepare the deeds procured by his money, whatever stipulations may have been entered into or whatever may be the rights of the parties as to the expense of preparing them.]

the property, or of the vendor's interest therein, such mistake shall not annul the sale; but a compensation or equivalent shall be given by the vendor or the purchaser, as the case may require, such compensation or equivalent to be settled by two referees, or their umpire; one referee to be nominated in writing by each party within one month after the discovery of such error, and notice thereof given to the other party; and in case either party shall neglect or refuse to nominate a referee within the said time, the referee of the other party may proceed alone. 6. CONDITIONS OF SALE OF FREEHOLDS.

Lastly, That if the purchaser shall neglect or fail to comply with the above conditions, his or her deposit money shall be actually forfeited to the vendor, who shall be at liberty to re-sell the estate, with or without notice, either by auction or private contract, and any deficiency on such sale, together with all expenses attending the same, shall be forthwith made good by the defaulter at this sale, and shall be recoverable by the vendor as and for liquidated damages, without previously tendering any conveyance to the purchaser.

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7. CONDITIONS *of* SALE *of* FREEHOLD *and* COPYHOLD FARMS, *sold in* LOTS, *part being* IN HAND, *and part in the Occupation of* TENANTS. 7. CONDITIONS OF SALE OF FREEHOLD AND COPYHOLD.

THAT the highest bidder for each lot shall be the purchaser; and if any dispute arise between two or more bidders, the lot in dispute shall be put up again at a former bidding, and re-sold.

II. That no person shall advance a less sum at each bidding than shall be named by the auctioneer at the time of putting up each lot, nor retract his or her bidding.

III. That the auction duty shall be paid in equal moieties by the vendor and purchasers.

IV. That each purchaser shall pay into the hands of the auctioneer, immediately after the sale, a deposit of 20*l.* per centum, in part of his or her purchase-money, together with his or her moiety of the auction duty, and sign an agreement for completing the purchase, and for payment of the residue of his or her purchase-money, on or before the —— day of ——, at which time the purchases are to be completed, and the respective purchasers are then to have the actual posses- Deposit. Purchaser to sign agreement for completion on a given day. Possession.

7. CONDITIONS OF SALE OF FREEHOLD AND COPYHOLD.

sion of the lots in hand, and to be let into receipt of the rents and profits of the other lots. All outgoings will be cleared by the vendor to the —— day of ——.

Vendor to deliver abstract,

V. That the vendor, at his own expense, will deliver abstracts of his title to the respective purchasers, or their solicitors, within fourteen days from the day of the sale, and

deduce good title,

deduce a good title for sixty years only, subject to these conditions; and, on payment of the residue of the purchase-money agreeably to the fourth condition, will, at the ex-

and convey.

pense of the respective purchasers, execute to them proper conveyances, surrenders (*a*), assignments, and assurances; but in case the completion of the several purchases should

Interest on purchase-money.

not take place on the said —— day of ——, the respective purchasers shall pay interest at 5*l.* per cent. per annum on the residue of their purchase-money, from that time up to the time of actually completing each such purchase. And the said respective purchasers shall, from the time of the commencement of such interest, be entitled to the possession (*b*) of the lots in hand, and the rents and profits of the other lots.

What expenses to be borne by purchaser.

VI. That the purchasers shall bear the expense of their own examination of the court rolls of the manors, and of any special courts which may be necessary, and also of the production of muniments of title, and copies of such muniments not in the vendor's possession, and of any travelling or other incidental expenses attending the examination thereof (*c*), and the costs of procuring any attested or other copies or extracts of wills, deeds, fees, or other documents which they may require for the purpose of verifying the abstract or otherwise, and of any deeds of covenant for the production of the same; and the vendors shall not be required to produce evidence of the common rights.

Evidence.

VII. That the vendor shall not be required to produce

(*a*) Purchasers of copyholds, even in the absence of express stipulation, must bear the expense of the surrender, admission, and fine. See 2 Sugd. Vend. 10th ed. 437.

(*b*) But as to the delivery of possession before completion, vide an observation, ante, p. 13.

As to expenses attending the examination of deeds.

(*c*) The rule is, that if any deeds are in the possession of a third person at a distance, the purchaser's attorney must attend for the purpose of examining the deeds, but the vendor pays the expense of his journey. *Sharpe* v. *Page*, Rolls, 1815, 2 Sugd. Vend. 10th ed. 82, ante, Vol. 1, p. 99. The condition in the text would throw this expense upon the purchaser.

7. CONDITIONS OF SALE OF FREEHOLD AND COPYHOLD.

Evidence.

any evidence of title to Lot — prior to certain indentures of lease and release of the —— and —— of ——, 18—, although any prior deeds or other documents may be recited or noticed in the abstracted deeds; or any evidence of title to Lot —, prior to the award of the commissioners of the —— inclosure act, which award bears date on or about the —— day of —— (*d*).

Out-standing estates.

VIII. That the conveyance, assignment, or surrender, of any outstanding estate, term, or interest, which has not been noticed for the last thirty years, and the obtaining of any probate, administration, or other document, required for that purpose, or for evidencing the title thereto, shall be at the expense of the purchasers requiring the same; and recitals of descents, deaths of parties, payment of money, heirships, intestacies, and other facts and matters, in deeds or court rolls, twenty years old and upwards, shall be deemed sufficient evidence of such facts and matters; and where, on account of any part of the property having been conveyed under a general description (*e*), or hedges having been removed, or otherwise, evidence of seisin or identity, or of the boundaries dividing the freehold and copyhold lands, is not afforded on the face of the deeds or court rolls, an affidavit of the possession or receipt of the rents for forty years and upwards, according to the title deduced, or of the identity of the premises, shall (in any case not specially provided for by these conditions) be deemed sufficient evidence of seisin or identity, and the vendor shall not be obliged to distinguish the boundaries of the manor of ——.

Recitals evidence.

Evidence of identity.

Evidence of mortgagee's title under Statute of Limitations.

IX. That the vendor shall not be required to produce any evidence of title to Lot —, other than certain indentures of lease and release by way of mortgage, bearing date the —— and —— days of ——, 18—, and an affidavit by the vendor, that he has been in possession for a period of twenty years and upwards, without having received interest, rendered or kept accounts, or done any other act as mortgagee, and without having been apprized of any claim being made or asserted to the right or equity of redemption (*f*).

(*d*) Vide ante, Vol. 1, p. 75.

(*e*) Vide ante, Vol. 1, p. 181.

As to mortgage titles.

(*f*) Whether a purchaser would be compelled to take a title of this kind is not clear. The objection to it is, that the fact upon which its validity depends, namely, the non-recognition of the mortgage debt, is not susceptible of positive proof, and there may have been disabilities in

7. CONDITIONS OF SALE OF FREEHOLD AND COPYHOLD.

Chief rent and heriot.

X. That, as some part of Lot —, reputed to be holden of the lord of the manor of ——, appears to be subject to a chief rent of 16*s.* 4*d.*, and a heriot in kind, payable on the death of every tenant, the said lot is sold subject thereto; but the vendor shall not be obliged to adduce any evidence as to the origin of the said rent.

Protection against dower.

XI. That the purchaser shall accept of an assignment of the residue of a term of one thousand years in Lots — and —, which is now vested in a trustee to attend the inheritance for the vendor, as a sufficient protection against the dower of the vendor's wife, such term appearing to have been created long antecedently to his marriage (*g*).

Possibility of issue.

XII. That the purchaser shall not object to the title of part of Lot —, on account of the possibility of a lady aged fifty-two years and unmarried, marrying and having issue (*h*).

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the mortgagor keeping alive the right of redemption. There is consequently ground to contend, that the case falls within the principle upon which it has been held, that a conveyance by a trader after an act of bankruptcy cannot be forced on the acceptance of a purchaser, although it is asserted that he owed no debt on which a commission could issue, it being impossible to prove the fact. [As to this, see now ante, Vol. 1, p. 112, and 5 & 6 Vict. c. 122, s. 7, which enacts, that no fiat shall issue upon an act of bankruptcy after the lapse of a year.] In *Stephens* v. *Bridges*, 6 Madd. 66, a bill was filed to enforce the performance of a contract for the sale of an estate held under a mortgage title, but no objection appears to have been made to the title on this ground. [In *Cooper* v. *Emery*, V. C. E. 1834, 1 Hayes' Introd. Conv. 274, a title acquired adversely by a mortgagee was forced upon a purchaser. See *Scott* v. *Nixon*, 2 Con. & Laws. 185; *Hobson* v. *Bell*, 2 Beav. 17.]

As to dower being barred by jointure.

(*g*) Vide ante, Vol. 1, p. 508. Sometimes the dower of the vendor's wife is barred by jointure; in which case, in order to avoid the question, whether a purchaser may claim to investigate the title to such lands, (as to which see 2 Sugd. Vend. 10th edit. p. 218), it will be advisable to stipulate:—

"That, inasmuch as by indentures of lease and release, bearing date the — and — days of ——, certain hereditaments were settled on the vendor's wife for life, in remainder immediately expectant on his decease, in lieu of her claim to dower in any part of his real estate, the purchaser shall rely upon such jointure in bar of dower, and shall not be entitled to require any farther evidence of the vendor's title to the jointure lands than the production of the said indenture of settlement, which will be covenanted to be produced at the expense of the purchaser."

(*h*) Where the age is such, as, according to the ordinary course of

7. CONDITIONS OF SALE OF FREEHOLD AND COPYHOLD.

XIII. That the purchaser shall accept the vendor's bond, (to be prepared by and at the expense of the vendor), in the penalty of 100*l.*, against a life annuity of 10*l.* affecting Lot —, the same being also amply secured out of large estates belonging to the vendor (*i*); but which fact it shall not be incumbent on the vendor to prove.

Indemnity against annuity.

XIV. That the respective purchasers shall take, at a fair valuation, in the usual way, the timber, timber-like trees, tellers, and pollards, down to 1*s.* per stick inclusive, (it being understood that the value of the usual claim of the lord of the manor is to be allowed out of that portion which is growing upon the copyholds (*k*)), also all customary tenant's fixtures in the several dwelling-houses and tenements in hand (*l*); together with the growing crops (if

Trees to be valued.

Fixtures and growing crops and stock.

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nature, to place this event beyond all risk, probably a purchaser would not be allowed to make the *legal* possibility of issue an objection to the title. In *Fraser* v. *Fraser*, 1 Jac. 586, n., Sir *W. Grant* decreed payment of a legacy, on evidence that the female to whose issue it was given was of the age of fifty-five, and unmarried. In the other cases, where this has been done, the age seems to have been greater. It is frequently provided, that the purchaser shall accept the vendor's bond against a possible but improbable event of this nature. See the following Condition and note.

(*i*) The general rule is, that a vendor is not bound to give, nor a purchaser to accept, an idemnity. See *Balmanno* v. *Lumley*, 1 Ves. & Bea. 225; and cases cited, 1 Sugd. Vend. 10th ed. 495; 3 Id. 154, 160.

(*k*) To prevent misunderstanding, it ought to be stated what this claim is.

(*l*) Where it is intended that the purchaser shall pay for fixtures, this should always be expressed; for it should seem, that, whatever would descend to the heir, as being fixed to the freehold, though, as between landlord and tenant, belonging to and removable by the latter, would pass to a purchaser with the house, the general rule, regulating what are fixtures, being that which obtains between the real and personal representatives, and not that which prevails between landlords and tenants, which is an exception to the general doctrine, founded on the convenience of trade. In a case, therefore, where a house was sold without any stipulation as to fixtures, it was held, that the vendor could not afterwards claim any compensation for stoves, cooling coppers, mash-tubs, water-tubs, blinds, &c., which were in the house, especially as he had delivered possession of and conveyed the house without making any such claim. *Colegrave* v. *Dias Santos*, 2 B. & Cr. 76; 3 D. & Ry. 255. In this case some of the articles in the house were clearly not fixtures; and Mr. Justice *Bayley* thought, that even these were not recoverable by the vendor after delivering possession of them with the house, as he must be considered as throwing them into the bargain. However, this point was not raised, the plaintiff having, in his particulars of de-

Rule between vendor and purchaser as to fixtures.

7. CONDITIONS OF SALE OF FREEHOLD AND COPYHOLD.

any), the dung and compost, and all articles of husbandry upon the farms and lands in hand, usually appraised by the custom of the country from an outgoing to an incoming tenant; and the purchasers are to pay for the same at the time of completing their purchases.

Vendors may hold auctions &c., until—.

XV. That the vendor shall be at liberty to hold auction-sales upon the farms and lands in hand, any time prior to the said —— day of —— next; and to use the barns, stabling, yards, &c., till the Lady-day following, for the purpose of threshing out the corn, and carrying off or feeding the hay, straw, and fodder, &c.

Custody of deeds.

XVI. That the purchasers of the larger part in value of any lots held under one title, shall, after the sale of all such lots, be entitled to the custody of the muniments of title now in the vendor's hands, upon entering into the usual covenant for the production thereof to the other purchasers. If any part of such lots shall remain unsold, the vendor shall be entitled to retain the said muniments, upon entering into the covenant aforesaid (*m*); and all such covenants shall be pre-

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mand, included these articles in the denomination of fixtures, and having thereby, it was held, precluded himself from claiming them as not being such. [See *Ex p. Bentley*, 2 Mon. D. & D. G. 591; *Ex p. Cotton*, Id. 725.] The question in regard to fixtures seldom arises when the premises are tenanted; for, in such a case, all that do not belong to the tenant, and those only, would pass with the house; for, as notice of a tenancy is notice of the terms of it, (see *Daniels* v. *Davison*, 16 Ves. 249), the purchaser would probably be considered as bound to inquire what fixtures belonged to the tenant; though, if he were entitled by special contract to more than ordinary tenant's fixtures, it would be more safe, and certainly more fair, in the vendor to state the fact. Indeed, it may be observed generally, that, if the purchaser be apprized of the property being tenanted, he ought, for his own security, to inform himself of the nature of the contract with the tenant, by a perusal of a copy or abstract of the lease or agreement by which he holds; or otherwise to require some notice to be taken of the terms of the tenancy in the contract for sale. Unless one of these precautions be taken, the purchaser, under the rule above adverted to, would be subject to any claims which might be set up by the tenant, by virtue of his lease from, or agreement with, the vendor, without being entitled to any compensation from the vendor on account of the nature of those claims, unless they were made the subject of distinct representation on the part of the latter. Of course, these observations do not apply to an *expired* tenancy, as where the property is described as *late* in the occupation of, or *late* the residence of A. *Miles* v. *Langley*, 1 Russ. & M. 39.

Purchaser should inform himself of the terms of any existing tenancy.

(*m*) Add, if so intended:—

"such covenant to be determinable, nevertheless, on the

pared by, and at the expense of, the person or persons requiring the same.

7. Conditions of sale of freehold and copyhold.

XVII. That, if any mistake be made in the quantity or contents of the several closes (*n*), or in the relative proportions of the freehold and copyhold lands, or any other error shall appear in the particulars, such mistake or error shall not annul the sale, but a compensation or equivalent shall be given or taken, as the case may require; such compensation or equivalent to be settled by two referees, or their umpire. Each party, within ten days after the discovery of the error, and notice thereof given to the other party, shall appoint one referee, by writing; and in case either party shall neglect or refuse to nominate a referee within the time appointed, the referee of the other party alone may make a final decision. If two referees are appointed, they are to nominate an umpire before they enter upon the business, and the decision of such referees or umpire, as the case may be, shall be final. But it is declared, that the existence of any public rights of way over the lands shall not entitle the purchasers to any compensation in respect thereof.

Compensation for errors.

Lastly. That if any purchaser shall neglect or refuse to comply with any of the above conditions, his or her deposit-

Provision for purchaser's default.

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vendor's parting with the said muniments of title, and procuring the person to whom they shall be delivered to enter into a similar covenant with the person then entitled to the benefit of the covenant which shall be so determined, such substituted covenant to be prepared by and at the expense of the person requiring the same."

(*n*) This condition is affirmative of the ordinary rule, which is, that the purchaser is entitled to compensation for a deficiency of quantity. Vide ante, Vol. 8.

Purchaser entitled to compensation for deficiency of quantity.

The case of *Winch* v. *Winchester*, 1 Ves. & Bea. 375, is not to be deemed an authority for holding any considerable variation of quantity to be covered by the words "more or less," which are, for the most part, words of course; and it may be observed, that these, or other such expressions, are, in general, neutralized by, as being inconsistent with, a minute specification of quantity, or at least they refer only to the smallest particulars of such stated quantity. Thus, if lands are described to be *about* a given number of acres, roods, and perches, the uncertainty implied by the word "about" can only extend to the perches, or, at most, to the roods and perches, for the enumeration of these supposes the number of acres to be ascertained. [See *Robinson* v. *Musgrave*, 8 Car. & P. 469: *Portman* v. *Null*, 2 Russ. 571: *Price* v. *North*, 2 You. & C. 620: *Pope* v. *Garland*, 4 You. & C. 403.]

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money shall be considered as forfeited, and retained by the vendor as ascertained and liquidated damages for such default; who, upon such default, shall be at liberty to re-sell the estate, either by public auction or private contract, without the necessity of previously tendering a conveyance or surrender to the defaulter; and the deficiency, if any, arising on such second sale, together with all expenses attending such re-sale, shall be made good by the defaulter at the present sale (*o*).

(*o*) A declaration that time shall be the essence of the contract is more frequently introduced at the instance of the buyer than of the seller, as the latter generally relies upon the condition in the text, entitling him to re-sell the estate and claim the deficiency from the purchaser. But this condition alone would not preclude the purchaser's right to a specific performance on account of a slight delay; and, therefore, if it is very important to the vendor that the contract should be completed within the prescribed period, a stipulation to the following effect should be inserted :—

Condition making time the essence of the contract.

"That if the purchaser, or respective purchasers, shall not, on or before the —— day of —— next, state their objections, if any, to the title of the vendor, or shall not, on or before the —— day of —— next, send to the vendor's solicitors for their perusal the draft of his or their conveyance, or shall not, on or before the —— day of —— next, pay the amount of his, her, or their purchase-money, then this contract shall be absolutely null and void to all intents and purposes whatsoever, and shall not be capable of being enforced by the purchaser in any court of equity, it being the intention of the said parties hereto, that time shall be deemed to be of the essence of the contract, any rule in equity to the contrary notwithstanding: Provided, nevertheless, that this present clause shall not preclude or prejudice the vendor's right to enforce the performance of the contract, if he shall think fit."

This condition in effect gives the vendor the right to rescind the contract. Perhaps it would be more simple to give him this right totidem verbis.

8. CONDITIONS *on a* SALE *by the* ASSIGNEES *of a* BANKRUPT, *who* STIPULATE *that the* PURCHASER *shall take the* BANKRUPT'S TITLE (*a*).

8. CONDITIONS OF SALE BY ASSIGNEES of BANKRUPT.

THAT the highest bidder shall be the purchaser, and if any dispute shall arise between two or more bidders, the premises (*b*) shall be put up again at the last bidding.

II. That no person shall advance less than £—— at any bidding, or retract his or her bidding.

III. That the (*c*) purchaser shall pay to the auctioneer (*d*), Deposit.

(*a*) It is now settled, that assignees in bankruptcy are under the same obligation to deduce a good title as other vendors. *M'Donald* v. *Hanson*, 12 Ves. 277; see also 18 Ves. 512: *Wilde* v. *Fort*, 4 Taunt. 334. If, therefore, the bankrupt's title be defective, the assignees should enter into special stipulations adapted to the nature of the defect, of which numerous specimens are given in the accompanying precedents; or, if the case requires it, should protect themselves under the general and very potent clause contained in the present form. But if assignees plainly neglect their duty to the creditors in the contract they enter into, such contract cannot be enforced by the purchaser. See *Turner* v. *Harvey*, Jac. 178: *White* v. *Cuddon*, 8 Cl. & Fin. 766; infra, p. 48. As to titles to be made by assignees in bankruptcy.

(*b*) If there be more than one lot, instead of "the premises," say—"the lot in dispute."

(*c*) If there be more than one lot, say—"each purchaser."

(*d*) Bankrupts' estates are exempted from auction duty. The question has been much agitated, whether this exemption extends to estates *in mortgage*. The case of *Coare* v. *Creed*, 2 Espin. 699, decided, that it did not, on the ground that the act of 19 Geo. 3, c. 56, s. 15, which was then in force, applied the exemption only to estates sold "by the order of the assignees." This was followed by the case of *King* v. *Abbott*, 3 Price, 178, where the point received a similar determination. Since these cases, the bankrupt act, 6 Geo. 4, c. 16, s. 98, has declared, that "all sales of any real or personal estate of any bankrupt or bankrupts shall not be liable to any auction duty." As this enactment is general, and not confined to estates sold by the order *of the assignees*, the decisions before the statute seemed not to apply; and, accordingly, it has been held by the Court of Exchequer, without impugning the authority of those decisions, that mortgaged estates are not now subject to the duty. *Rex* v. *Winstanley*, 2 You. & Jerv. 124; 3 Id. 126. The sale had been made by the order of the assignees for the benefit of the mortgagees and Bankrupts' estates exempt from auction duty.

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immediately after the sale, a deposit at the rate of 10*l.* per cent. on the amount of his or her purchase-money, and sign

the bankrupt's estate. The Lord Chief Baron (*Alexander*) rested his decision principally on the argument that the act was passed for the benefit of bankrupts' estates, and that, whether the mortgaged estate was greater or less in value than the amount of the money due upon it, the charge would eventually fall upon the bankrupt's estate; in the former case, by diminishing the assignees' surplus; and, in the latter case, by diminishing the fund for payment of the mortgagee; and thereby increasing the amount of the proveable claim against the estate. [This decision was finally affirmed on that ground, in the House of Lords, 1 Cr. & J. 434. See *Bleaden* v. *Hancock*, M. & Mal. 466.] As the point had been the subject of controversy before the late bankrupt act, it is remarkable, that the framers of the act did not insert a few words affirming or negativing the exemption. Considered as a means of preventing litigation, this statute is certainly not one of the most successful efforts of modern legislation.

What deeds, &c., relating to bankrupts' estates are exempt from stamp duty.

[Sect. 98 of the 6 Geo. 4, c. 16, above referred to, is in these words: that "all commissions of bankrupt, and also all deeds, conveyances, assignments, surrenders, admissions, and other assurances of, or to, or relating solely to, any freehold, leasehold, copyhold, or customary messuages, lands, or tenements, or any mortgage, charge, or other incumbrance upon, or any estate right or interest of and in any messuages, lands, tenements, or personal estate, being the estate of or belonging to any bankrupt or bankrupts, or part or parcel thereof, and which, *after the execution* of such deeds, conveyances, assignments, surrenders, or assurances respectively, shall, *either at law or in equity, be or remain* the estate and property of such bankrupt or bankrupts, or the assignee or assignees appointed or chosen by virtue of the commission issued against him or them respectively; and also all powers of attorney, writs of supersedeas and procedendo, certificates of conformity, affidavits, *and all other instruments and writings whatsoever relating solely to the estate or effects of any bankrupt or bankrupts*, or any part thereof, or to any proceedings under any commission of bankruptcy; and all advertisements inserted in the London Gazette, relating solely to matters in bankruptcy, *shall not be liable to any stamp duty or any other government duty whatsoever;* and all sales of any real or personal estate of any bankrupt or bankrupts shall not be liable to any *auction duty*."]

[In *Flather* v. *Stubbs*, 2 Gale & D. 290; 2 Q. B. R. 614, it was decided that this clause exempts the agreement for the sale of the bankrupt's estate from stamp duty. "We are of opinion," said the Court, "that this contract of sale falls within the very words of the exemption, being an instrument relating solely to the estate of the bankrupt." It seems to have been admitted that the conveyance would be liable to the stamp duty; and, therefore, the ground on which the decision is to be supported must be that, though the contract passes the bankrupt's equitable interest, he still "retains the estate at law;" although the Court relied rather on the general words "all other instruments and writings whatsoever relating solely to the estate of the bankrupt," words which, if not

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an agreement for the payment of the remainder to the vendors on the —— day of ——, when the purchase is to be completed; from which time the purchaser is to be entitled to the rents and profits (*e*) of the estate.

Agreement.

IV. That upon payment of the remainder of the purchase-money at the time aforesaid, the purchaser shall have a conveyance of the bankrupt's interest in the premises (*f*), to be prepared by and at the expense of the purchaser; but the vendors shall not be obliged to produce any documentary or other evidence of title whatsoever, other than and except the usual certificate, or sealed copy of the certificate, of the appointment of the assignees under the said bankruptcy; And also except certain indentures of lease and release of the —— and —— days of ——, by which the estate now offered for sale was conveyed unto and to the use of the bankrupt, his heirs and assigns, for ever, and an abstract of which shall be delivered within —— days after the sale; and if the purchaser shall require the fiat, or any part of the depositions

Conveyance.

Title and evidence.

Inrolment of proceedings.

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controlled by the preceding part of the clause, would obviously include the conveyance as well as the contract.]

(*e*) If the premises are in hand, say—

"possession."

A bankrupt in possession of property which has been sold by his assignees, will be ordered to deliver it up, though a petition to supersede the commission be pending. *Ex parte Hargraves*, 2 Gl. & Jam. 59. See *Ex parte Hawkins*, Mont. & M'A. 115.

(*f*) [This is rather an ambiguous, and, therefore, not very safe expression, for excluding the purchaser from raising objections to the title. In *Freme* v. *Wright*, 4 Madd. 364, the condition which was held to bind the purchaser to take such title as the bankrupt had, was thus worded:—

Condition that purchaser shall take vendor's title.

Freme v. *Wright.*

"The purchaser shall have an assignment of Mr. Howard's interest to one moiety of the estate under such title as he lately held the same, an abstract of which may be seen at the office of Messrs. ——."

In that case, however, the auctioneer had verbally explained, at the sale, that the property was re-sold on account of a defect in the title, and that the purchaser was not to expect a good title; but that circumstance, though it might probably disincline the Court to strive against supporting the condition, could not be judicially noticed. If, as in *Freme* v. *Wright*, the condition states, that an abstract may be seen before the sale, care should be taken not only to have the abstract ready, *but also to promulgate the condition* a sufficient time before the sale, to afford an opportunity to bidders of inspecting the abstract. In *Freme* v. *Wright*, Sir *J. Leach*, V. C., offered the purchaser an inquiry as to that fact.]

As to shewing the abstract before the sale.

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or proceedings under the fiat, to be entered of record, the same shall be done by and at the expense of the purchaser (*g*).

V. That if the completion of the purchase should be delayed, from any cause whatsoever, beyond the said —— day of ——, the purchaser shall pay interest at the rate of 5*l.* per cent. per annum on the residue of his or her purchase-money from that day until the time of payment; and the purchaser shall, during such period, be entitled to the rents and profits of the said premises.

Interest on purchase-money.

(*Add other conditions, as in former precedents.*)

(*g*) As to the purchaser's right to require the inrolment of the proceedings, vide ante, Vol. 1, p. 95.

9. CONDITIONS OF SALE UNDER DECREE IN CHANCERY.

9. CONDITIONS *for the* SALE *of an* ESTATE SOLD *in Lots under a* DECREE *in the* COURT *of* CHANCERY, *with various special* STIPULATIONS *as to* TITLE (*a*).

THAT each lot shall be put up at the sum fixed by the auctioneer, and no bidding shall be made at an advance of less than £—— on the last preceding bidding.

II. One bidding will be reserved for each lot according to the order of the Court of Chancery (*b*).

Payment of purchase-money.

III. That the purchaser of each lot shall pay the amount of his or her purchase-money into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Chancery, in trust, in the cause of [*plaintiff*] *v.* [*defendant*], together with the amount of the valuation of the timber and trees thereon, on or before the —— day of —— next; and on payment of which the respective pur-

(*a*) Of course, it could scarcely ever happen that so many special stipulations respecting title as are inserted in this or the following precedent, would be requisite in any one case. The Editor's aim has been to supply conditions adapted to most of the questions which ordinarily occur; and it seemed desirable to distribute them into as few precedents as possible.

Auction duty.

(*b*) The particular refers to the fact of the sale being by order of the Court, and names the cause, place of sale, &c. The usual condition as to the payment of auction duty, it will be observed, is not inserted, sales by order of Court being exempt from such duty.

9. CONDITIONS OF SALE UNDER DECREE IN CHANCERY.

chasers shall be entitled to the rents and profits from the said —— day of ——, up to which time all outgoings shall be cleared by the vendor (*c*).

Interest on purchase-money.

IV. That if, from any circumstance, the purchase-money of any lot or lots shall not be paid on or before the said —— day of ——, the purchaser or respective purchasers shall pay interest thereon respectively at the rate of 4*l.* per cent. from that day until the time of payment (*d*), during which period he or they shall be entitled to receive the rents and profits of the lot or lots purchased by him, her, or them, respectively.

Purchaser to pay for manure, &c.

V. That the purchasers of Lots — and — shall take to and pay to [*tenant*], the tenant of the same lots, at the time of taking possession of each Lot respectively, for all manure, dressings, and half-dressings, seeds, straw, and other things on each lot, according to the custom of the country, as usual between incoming and outgoing tenant; the amount of which shall be settled by two persons, one to be appointed by the said [*tenant*], and the other by the purchaser; and, in case of their disagreement, by an umpire to be chosen by them, whose decision shall be final.

Title.

VI. That the vendor shall deduce a good title to the respective lots, subject to the qualifications herein contained.

As to evidence of apportionment of rent-charge.

VII. That, inasmuch as the fee-farm rent of 4*l.*, issuing out of Lot ——, forms part of a rent of 36*l.*, which, in the year 1770, was granted out of a larger piece of ground, and the remainder of such rent of £—— is amply secured by the residue of the ground charged therewith, the purchaser shall not require evidence of the apportionment of the original rent, or of the discharge of the said premises therefrom, or of its being sufficiently secured out of the other part charged, other than the production of the receipts for the said rent of 4*l.*, for the last twenty years (*e*).

(*c*) The general rule in the case of sales by order of Court is, that the purchaser is entitled to the rents and profits from the quarter day preceding the payment of the purchase-money into Court. See *Anson* v. *Towgood*, 1 Jac. & W. 639.

(*d*) Interest is not payable for the timber, because, if the completion of the purchase be delayed, its advanced growth at the time of valuation is an equivalent. See 3 Sugd. Vend. 10th ed. 105.

As to property being sold subject to an apportioned part of a larger rent.

(*e*) This is a case often occurring in titles. In *Barnwell* v. *Harris*, 1 Taunt. 430, it appeared, that the messuage in question, with other houses, was built upon land demised, in 1764, at 28*l.* rent, and that the owner of the rent had, for more than twenty years, accepted 2*l.* a year

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Not to require evidence as to A.'s widow.

VIII. That the purchaser shall not require evidence of the fact of a person, who died seised in fee of the property comprised in lot ——, in the year 18—, having left no widow, or of her being since dead, as the vendor has endeavoured to obtain information on the subject without effect (*f*).

Dissenters' register to be evidence.

IX. That the purchaser shall not be entitled to require further evidence of [A. B.] having been the son of [C.] and [D.] his wife, and of his having attained his majority on the —— day of ——, than the production of an extract from the register of baptisms belonging to the Society or Congregation of Dissenters, at —— street, in the city of ——, dated the —— day of ——, in which he is stated to be the child of the above-named persons, and to have been born on the —— day of ——, 18— (*g*).

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rent for these premises. The purchaser brought an action for his deposit on an objection to the title, founded on the liability of the premises to the larger rent. *Mansfield*, C. J., left it to the jury to consider, whether the rent had been apportioned by the act of the landlord; and they found for the plaintiff. The Court refused to disturb the verdict, being of opinion that the vendor was bound to adduce evidence of the apportionment, and could not oblige the purchaser to rely upon an apportionment being presumed from the payment for twenty years of the smaller rent; for admitting such presumption to be clear, in the absence of all evidence, it might be rebutted by contrary evidence.

Inquiry to be made as to dower.

(*f*) Wherever a person, under whom the vendor derives his title, appears by the abstract of title to have been solely seised of the inheritance in possession, inquiry will of course be made as to the fact of his having been married at the time, and prior to the 2nd January, 1834. Perhaps, proof of the negative of this cannot be required; and the purchaser ought, in order to entitle him to any evidence of the exemption of the estate from dower, to shew that the owner of the estate was married during his seisin, or at least to raise a presumption of this fact, by shewing that he had a wife at some anterior or subsequent period. When the fact to be ascertained is, whether a deceased person left a widow, his will should be looked into to see if mention is made of a wife; or, if he died intestate, it should be inquired to whom administration was granted. Sometimes the parochial register of burial states whether the deceased was a bachelor.

Parochial baptismal register no evidence of time of birth.

(*g*) The statement in a register of christenings, of the child having been born on some anterior day, is no evidence of that being the period of its birth, as this is a fact not necessarily within the knowledge of the clergyman who makes the entry, but is communicated to him by others, and he is not required by law to notice it in the registry. The age, therefore, can only properly be computed from the time of baptism. *Wihen* v. *Law*, 3 Stark. 63. [As to the Registry Act, 6 & 7 Will. 4, c. 82, vide ante, Vol. 1, p. 168.]

As to dissen-

The baptismal and burial registers kept by dissenters, though frequently

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X. That inasmuch as the counsel of the vendor is of opinion, that an estate in fee-simple in lot ——, which was conveyed to trustees in the year ——, may be presumed to have been reconveyed, the vendor shall not require a reconveyance of such estate (*h*).

Presumption of reconveyance.

XI. That, as the lands comprised in lot —— are covered by a modus of 2*d.* in lieu of each ton of hay, the vendor shall not be obliged to produce any other evidence in support of such modus than receipts showing the uninterrupted payment thereof for the period of —— years; and the purchaser shall be precluded from making any objection whatever to the validity of such modus (*i*).

Evidence of modus.

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accepted in matters of title, as affording a reasonable presumption of the truth of the facts which they affirm, are not strictly evidence. Thus, in *Ex parte Taylor*, 1 Jac. & W. 483, an examined copy of an entry in the register of the births of dissenters' children, kept at Dr. Williams's library, in Redcross-street, was rejected as evidence of the age of a person petitioning for payment of a legacy under statute 36 Geo. 3, c. 52, s. 32. A register of baptisms in the island of Guernsey has also been held to be inadmissible to prove the age of a petitioner in Chancery.* *Huet* v. *Le Mesurier*, 1 Cox, 275. [See now stat. 3 & 4 Vict. c. 92, ante, Vol. 1, p. 163].

ters' registers of baptisms, &c.

Where copies of registers are produced as evidence of title, they should be accompanied by affidavits of identity, especially if of a recent date, and the name be common. The baptism or burial of John Smith, or William Brown, in a populous parish, would be very imperfectly proved by a parochial register of the baptism or burial of a person of that name, without evidence of identity. It may be observed, that, where an estate has descended through the same channel as a peerage, it is not usual to require the ordinary evidence of heirship, because the facts must have been proved previously to the heir taking his seat as a peer in the House of Lords.

Evidence of identity should accompany registers.

(*h*) Vide ante, Vol. 6, p. 444.

(*i*) [The difficulty of establishing a modus, even, in many cases, since the stat. 2 & 3 Will. 4, c. 100, (stated ante, Vol. 1, p. 54) is such, that a vendor will generally do well to shelter himself under a condition of this kind. It seems to be the better opinion on the construction of that statute, that it extends only to fulfil the intention expressed in the pre-

As to evidence of exemption from tithes, &c.

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* See some observations of Lord *Eldon* on the admission of copies of parochial registers as evidence. *Walker* v. *Wingfield*, 18 Ves. 443. An entry made by a clergyman of a christening, performed by his predecessor, is not evidence; nor is the memorandum of the parish clerk who was present. *Doe* v. *Bray*, 8 B. & C. R. 813; 3 M. & Ry. 428. The keeping of parochial registers is regulated by statute 52 Geo. 3, c. 146; see also 4 Geo. 4, c. 76. [Vide ante, Vol. 1, p. 136.]

9. CONDITIONS OF SALE UNDER DECREE IN CHANCERY.

XII. That as Lot —— contains some small slips of land lying between the antient boundaries of the —— estate and the turnpike road, and which have been inclosed several years, the purchasers shall be satisfied with the possession of such slips of land, and shall not require any title thereto (*k*).

Title to slips by roadside.

Evidence of statement in particulars.

XIII. That the vendor shall not be bound to adduce evidence of any fact which is stated or assigned as the ground or reason for any of the stipulations contained in these conditions (*l*).

Custody of deeds.

XIV. That the purchasers shall be entitled to the custody of such deeds (if any) as may relate exclusively to the lots purchased by them respectively, but such title-deeds as relate to any other lot, shall remain in the Master's office until the whole of the lots shall have been disposed of, with

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amble, viz., to shorten the time required for the proof of claims of modus or exemption, or, in other words, to bring down the commencement of the period of legal memory from the beginning of the reign of Richard 1 to the commencement of the period of sixty years or other time mentioned in the act, leaving all other matters which were formerly essential to the validity of the claim, to be proved as before. So that the claimant must shew a legal origin, or grounds for presuming a legal origin to his title, in the same manner as formerly; and is only protected from having the presumption in his favour rebutted by evidence of payment of tithes in kind, &c., prior to the period established by the act. Thus, according to the opinions referred to, he must shew, in support of a claim of exemption, that the lands in question belonged to one of the greater monasteries, &c. See *Salkeld* v. *Johnston*, 1 Hare, 196; *Fellowes* v. *Clay*, Q. B., 1843, 3 Jurist, 343. There seems to be good ground for contending, however, that the objection of rankness, being used merely to raise a presumption against the remote origin of a modus, can no longer be urged, in the face of an enactment that express evidence of a modern origin shall not be admitted. As to the essential qualities of a modus prior to the late act, see 2 Eagle on Tithes, 71.]

Waste lands by the roadside.

(*k*) It is a presumption of law, that the small pieces of waste, or uninclosed land, frequently found by the roadside, belong to the owner of the inclosed land next adjoining, ante, Vol. 1, pp. 79, 463.

As to the necessity of proving an alleged fact in certain cases.

(*l*) Where a person alleges a fact as a ground or reason for any stipulation which he imposes on another with whom he is contracting, it is by no means clear that he may not be called upon by the latter party to prove the fact so alleged. The application of this rule to the present conditions of sale, it is obvious, would throw upon the vendor the necessity of adducing proof of many circumstances which would be difficult and inconvenient to establish, and greatly defeat the object of the stipulations in question; which, therefore, ought to be accompanied by the present condition, or else they ought simply to provide that the specified things shall not be required without assigning any cause or reason for it.

liberty to the purchasers at the present sale to inspect such deeds from time to time, as occasion may require; and when a sale of the whole of the other lots shall have been effected, the said deeds shall be delivered to the purchaser of the largest lot, on his entering into a deed of covenant with the other purchasers for the production thereof, and for furnishing copies or extracts, such deeds of covenant to be prepared at the expense of the covenantees respectively; and the purchasers at this sale shall not be at liberty to object to the transfer of the purchase-monies out of Court, by reason of the deeds being to remain in the Master's office.

9. CONDITIONS OF SALE UNDER DECREE IN CHANCERY.

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10. CONDITIONS *of* SALE *of a* CONSIDERABLE ESTATE *sold in the Country, by* DEVISEES IN TRUST (*a*), *in* NUMEROUS LOTS, *some of which were very small, with various* QUALIFICATIONS *and* RESTRICTIONS *as to* TITLE, *&c.*

10. CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

I. THAT the respective lots shall be put up at such prices as shall be announced by the auctioneer.

(*a*) Where the vendors sell as trustees, it is proper to state the fact in the particulars or conditions of sale, in cases at least in which the purchaser cannot have covenants for title; as, where the property is sold for the payment of debts, or for the benefit of interests, &c. Sir E. Sugden, in several of the editions of his Treatise on Vendors and Purchasers, expressed a doubt whether specific performance could be enforced against a purchaser from whom the information in question had been withheld. Sugd. Vend. & Purch. 6th ed. 455. But, in the last edition, this eminent writer has suppressed the passage, whether on account of a change in his opinion on the point does not appear. [See 10th ed. Vol. 2, p. 453. In *Ex p. Witts*, 6 Jurist, 936, upon a sale by trustees, in whom a settled estate had been vested by a private act of Parliament upon trusts for sale, Sir *L. Shadwell*, V. C., held, that the owners of two vested successive estates for life, under the settlement, were necessary parties to covenant for the title.] If it be decided that the want of covenants for title on the occasion of his own purchase discharges a purchaser, the question would arise, whether the same consequence does not ensue from a similar deficiency in any antecedent conveyance; for it seems difficult to distinguish the two cases, and to extend the doctrine to the latter would invalidate ninety-nine out of every one hundred titles in the kingdom. Indeed, it might happen, if any such rule were established, that a contract, originally binding, might become, from subsequent circumstances, incapable of being enforced against a purchaser; as, where a man, after contracting for the

Whether want of covenants for title discharges a purchaser from his contract.

10. CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

II. That the highest bidder for each lot shall be the purchaser, and if any dispute shall arise as to the last or highest bidding for any lot, the lot with respect to which such dispute shall arise shall be put up again at the last preceding bidding.

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sale of an estate, dies, having disposed of his real and personal estate in such a manner as to devolve to different persons, the latter (which would include the produce of the sale) to minors, who are necessarily incapable of covenanting for the title, which the heir or devisee, of course, having no beneficial interest in the property which he conveys, would not be compellable, and could not be expected voluntarily, to do. If the purchaser is entitled to insist on covenants at all, of course he may require that they should proceed from the beneficial owners themselves; and he would not be bound to accept the covenants of a stranger, or, it is conceived, those of one *cestui que trust* in regard to the share of another who is incapacitated by infancy or otherwise from joining.

As to sales by trustees under restrictive conditions.

[As to the validity of a sale by a trustee, mortgagee, assignee of an insolvent or bankrupt, under restrictive conditions, see ante, Vol. 8, *Wilkins* v. *Fry*, 1 Meriv. 268, 2 Rose, 375: *White* v. *Cuddon*, 8 Cl. & Fin. 766: *Hobson* v. *Bell*, 2 Beav. 17. In the latter case the conditions on the sale by a mortgagee of a reversionary interest in stock, were, that the objections to the title should be made within a certain time, that the purchaser should not require the concurrence of the mortgagor, that the purchaser should bear the expense of all evidence, copies of deeds, &c.; and the Master of the Rolls was of opinion that these conditions were not of such a depreciating nature as to constitute a breach of trust. In *Ord* v. *Noel*, 5 Mad. 446, Sir *J. Leach*, V. C., laid down the rule that a vendor at a sale by auction must exercise the same caution that a provident vendor would have applied in the case of his own property. Now, a prudent vendor invariably resorts to special conditions wherever the circumstances of his title render it probable that he may be unable to enforce a contract entered into without such protection, or may be put to great expense by unreasonable or unnecessary requisitions on the part of the purchaser; and wherever the title would be clearly unmarketable, if sold without restriction, or the purchaser would have an opportunity of putting the vendor to great expense to procure evidence, which, if the purchaser had to pay for, wholly or in part, he would probably waive; the trustees, it is presumed, would not only be justified in providing against these contingencies by proper stipulations, but might, perhaps, be made answerable for having neglected them. To put up an unmarketable title for sale, without restriction, would, it is conceived, be a clear breach of trust. This consideration should suggest to trustees the propriety, or rather necessity, of investigating their title in every case before they attempt to sell; a precaution now very generally adopted by vendors of every description.]

[Trustees should give ample notice of the time, place, and conditions of sale to all the persons beneficially interested. See an *Anonymous Case*, 6 Mad. 10.]

10. CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

III. That no person shall advance less than 20*l.* at any bidding, on Lots —, —; 10*l.* on Lots —, —; 5*l.* on Lots —, —, —; and 2*l.* on each of the other lots; or retract his or her bidding.

Deposit.

IV. That the respective purchasers shall immediately pay down a deposit, in the proportion of 10*l.* for every 100*l.* of his or her purchase-money, when it shall amount to 200*l.* and upwards, and 20*l.* for every 100*l.*, when it shall amount to a less sum, into the hands of [*vendor's solicitor*] (the solicitor of the vendor), and sign an agreement for payment of the remainder on the —— day of —— next, between the hours of 10 and 11 of the clock in the forenoon, at the offices of the said [*vendor's solicitor*], situate in ——, at which time and place the purchases are to be completed, and the respective purchasers are from thenceforth to be entitled to the rents and profits of the said premises; and all outgoings to that time to be cleared by the vendors; but if the completion of the purchases shall be delayed from any cause whatever, beyond the said —— day of ——, the purchaser shall pay interest at the rate of 4*l.* 10*s.* per cent. per annum from that day.

Agreement.

Completion.

Possession.

Interest.

Abstract.

V. That the vendors shall, on or before the —— day of —— next, at the expense of the trust-estate of the late [*testator*], deceased, prepare a general abstract of their title to the manor of ——, and the farms and lands thereto belonging, which shall be left at the offices of the said [*vendor's solicitor*], for the inspection of the respective purchasers, or their counsel or solicitors; but the vendors shall not be obliged to deliver a copy of the whole abstract (the same being of considerable length), except to the purchasers of Lots —, —; and that the vendors shall deliver to the respective purchasers of the other lots, which comprise the manor of ——, and the lands thereto belonging, an abstract of their title for the last forty years; but, if any or either of the purchasers of such other lots shall require a copy of the whole abstract, the same shall be delivered to them or him on their or his application, and paying for the same, but not otherwise (*b*). And that the vendors shall, on or before the said —— day of —— next, at the expense of the said trust-estate, deliver to the respective purchasers

Purchasers of certain lots only to have copies of abstract.

(*b*) Where the abstract of title is very long, and some of the lots small, a stipulation to this effect is often found to be useful.

10. CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

of the lots not held under the general title to the manor of ——, and lands thereto belonging, a complete abstract of their title thereto. And if the said respective purchasers, or their solicitors, shall not, within one calendar month after the delivery of the said respective abstracts, state to the said [*vendor's solicitor*] some valid objection to the title, they shall be considered as accepting the same; and all objections not delivered by that time shall be considered as waived.

Time for making objections.

Evidence as to exchanges, allotments, &c.

VI. That the vendors shall not be called upon for, or required to produce, any evidence or documents of title to the lands which have been taken in exchange, anterior to the deeds by which such exchanges have been effected; nor to deduce the title to the lands given in exchange (*c*); nor shall any title be required to the allotments which have been set out or awarded for the said [*testator*], deceased, by the commissioners under the act of Parliament for inclosing lands in the said parish of ——, other than an extract from their award.

Old recitals evidence.

VII. That no evidence shall be called for or required by the respective purchasers to be produced, of the birth, marriage, death, intestacy, or heirship of any person or persons, or of any other fact material to the title, (either for the purpose of verifying the abstract or otherwise), where such facts shall have been stated, or taken notice of, or implied in any of the title deeds bearing date upwards of thirty years ago; nor shall any purchaser require evidence

Old legacies presumed to be paid.

of the payment or other discharge of any legacy or sum of money charged on any of the said premises, by any will or codicil, which became payable more than —— years since, nor of the payment of arrears of life-annuities which have

Evidence as to rent.

ceased or expired more than six years (*d*). And inasmuch as the manor of —— and other hereditaments were formerly subject to a yearly fee-farm rent of £——, which was purchased by the said [*testator*], and conveyed to him by indentures of lease and release, of the —— day of ——,

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(*c*) As to this, vide ante, Vol. 4, p. 3, Vol. 1, p. 75.

Arrears of annuities should be shewn to be paid.

(*d*) It is not enough to prove that an annuity affecting the property is expired; evidence should be adduced of its having been duly paid up to the time of its expiration. The case of *Wynne* v. *Williams*, 5 Ves. 130, stated ante, Vol. 1, p. 110, strongly shews the necessity of attention to this point.

18—, with a schedule of the deeds and writings of the anterior title, no purchaser shall require the vendors to produce any other evidence of the anterior title to the said rent than the said schedule. Nor shall the purchaser of Lot — be entitled to require evidence that the said [*testator*] who purchased the same as a reversionary interest, gave a full and adequate consideration for the same (*e*).

10. CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

Consideration for purchase of reversion.

VIII. That, upon payment of the remainder of the purchase-money at the time and place above mentioned, and the full observance and performance of these conditions of sale on the part of the respective purchasers, the vendors will execute conveyances to the said purchasers; but as the said vendors are only devisees in trust under the will of the said [*testator*], they shall not be required to enter into any other covenant than that they have done no act to incumber.

Conveyances.

Covenants by trustees.

IX. That the purchasers shall not be entitled to require that the will of [*testator*] a deceased owner of the premises, dated the —— day of ——, which is in the hands of attornies, shall be proved, but shall accept his covenant for the production thereof, which shall be prepared by the purchaser at his own expense (*f*).

As to proving will.

X. That the deeds of conveyance, and any assignment of outstanding terms already assigned to attend, or otherwise attendant on the inheritance, shall be prepared by and

Expenses of assignments.

(*e*) As to this, vide ante, Vol. 1, p. 184, Vol. 3, p. 430, *Addis* v. *Campbell*, 4 Beav. 401.

(*f*) Where an unproved will is in the hands of a third person, the purchaser is entitled to have it proved in the Ecclesiastical Court, or deposited with one of the Masters of the Court of Chancery for safe custody; and the circumstance that the heir-at-law has joined in the conveyance does not negative this right, for it might happen that a devise had been made by the testator in favour of some other party; and, therefore, without seeing what the will contained, it would be impossible to say whether the vendors had a good title to the premises. *Coppard* v. *Harrison*, 2 Cox, 320. It does not appear in this case that a covenant for the production of the will had been offered. If a purchaser were entitled to reject such a covenant, it could not be on the ground that the probate of it in the Ecclesiastical Court gives to the will additional value, as evidence of title relating to the real estate (which clearly it does not). Indeed, if the will relate to real estate only, that Court has no jurisdiction over it; but where it embraces personalty, as wills commonly do, it ought to be proved there, and hence it is that that Court has become the general repository of wills both of real and personal estate.

As to proving wills.

10. CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

at the expense of the respective purchasers; and the same shall be executed or tendered to be executed, and ready to be delivered at the time and place above mentioned (*g*).

Custody of deeds.

XI. The purchaser of each lot shall be entitled to the custody of such deeds as relate solely to his or her respective lot; but as in some instances the several lots are held under the same title, the purchaser of the greatest part in value of such lots, (provided all the lots held under the same title be sold), shall have the custody of such of the title deeds as relate to the estate purchased by him or her, jointly with any other parts or parts thereof; he or she, nevertheless, entering into the usual covenants for the production thereof, at the expense of the persons requiring the same, to such of the purchasers of the property of the vendors held under the same title, as shall require such covenant; but if any of the estates remain unsold, the vendors shall be entitled to retain the deeds relating thereto: and whilst they remain in their hands they shall produce them to the several purchasers when required. And should the vendors be unable to obtain a covenant for the production of any such deeds before the time hereinbefore fixed for the completion of the purchases, such inability shall not occasion any delay in the completion of the compacts; but the purchasers shall complete the same under the arrangement aforesaid, they taking such deeds of covenant when the vendors are in a situation to obtain them.

Attested copies.

XII. That all attested and other copies of title deeds, wills, or of other documents relating to the said hereditaments, and all limited administrations to the effects of any deceased termor or termors, all parochial certificates, affidavits, or declarations in lieu thereof, or other evidences of title whatsoever (*h*), which shall be required by any purchaser or

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Purchaser not bound to discharge incumbrances by his conveyance.

(*g*) Sometimes, in order to prevent questions, though, as it should seem unnecessarily, (vide ante, p. 30), a clause to the following effect is added:

"That if any lot or lots is or are subject to any mortgage or mortgages or other incumbrances, the persons or person entitled to the benefit thereof shall concur in the conveyance to the purchaser or purchasers, for the purpose of releasing or discharging the same; but the entire expenses of such conveyance shall, nevertheless, be borne by the purchaser."

(*h*) This condition, it will be observed, throws upon the purchasers

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purchasers, and also the inquiries for the personal representatives of any deceased termors, shall be made, taken out, or procured by the solicitor of the vendors, at the expense of such purchaser or purchasers.

Payment to auctioneer,

XIII. That the purchaser of each lot shall, immediately after the sale, pay to the auctioneer the auction duty; and also, for his trouble in selling the premises, the sum of £—— for Lots —, —, —; £—— for Lots —, —, —: and £——for each of the other lots; and shall also pay the like sum to the solicitor of the vendors, for the contracts or agreements before mentioned, in addition to the stamp duty.

to solicitor.

Proviso for default.

XIV. That if the purchasers of any or either of the said lots shall neglect or fail to comply with the above conditions, and to complete his, her, or their purchase or purchases, by the time and in manner aforesaid, the money by him, her, or them deposited by way of earnest, shall be actually forfeited to the vendors, who shall be at full liberty to re-sell the premises comprised in the lot or lots bought by such purchaser or purchasers respectively, either by public auction or private contract; and in such case, the deficiency (if any) occasioned by such second sale, together with all charges attending the same, shall, immediately after the same sale, be made good by the defaulter at the present sale; and in case of non-payment of the same, the whole thereof shall be recoverable by the vendors as and for liquidated damages; but any increase of price which the said premises may produce on such second sale shall belong to the vendors, who shall be at full liberty to do with the premises as they shall think fit.

Errors.

XV. That, if any error or mistake shall appear in the description of any of the lots, or in the nature or quantity of the vendor's interest therein, or any other error shall appear in respect thereof, such error or mistake shall not vacate or

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Distinction between information and evidence to be furnished by the vendor.

the entire expense of procuring evidence in support of the vendor's title. Such a condition, however, is not unusually inserted. It must be remembered, however, that though it denies to purchasers the right of calling for evidence, it does not preclude them from requiring such information as is requisite to complete the abstract. For instance, though the purchasers cannot, under the condition in question, require a parochial certificate of the burial of an annuitant or tenant for life, alleged to be dead, yet they may insist on being informed when and where such death occurred, unless the condition of sale goes the length (which it rarely does) of excluding his right even to this species of information.

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annul the sale; but a compensation shall be given or taken, as the case may require, which shall be ascertained and determined on behalf of both parties by [T. R.] of ——, land surveyor (*i*).

Power to rescind contract.

XV. That, if it shall appear that a good title cannot be made to part of the lands comprised in any lot or lots, this shall not annul the sale in respect of such entire lot or lots, but the contract shall be carried into effect as to the residue of the property comprised in such lot or lots, and a reduction pro ratâ made in the purchase-money, to be fixed by the said [R. T.]. And if such defect of title shall comprise an entire lot, the vendors shall be at liberty to rescind the contract, on returning to the purchaser the sum paid by him at the time of the execution of the contract, without any further claim on the part of the purchaser (*k*).

Proviso as to tenants and rents.

XVI. That if any or either of the tenants shall not quit and deliver up the possession of the premises in his, her, or their occupation on the —— day of —— next, the rent or rents payable by such tenant or tenants in respect of such premises so occupied by him, her, or them, shall from thenceforth, until such tenant or tenants shall quit, be apportioned between the respective purchasers, if more than one, of such premises; or if the whole shall not be sold, then between the purchaser or respective purchasers and the vendor, as the case may be, such apportionment to be made by the said [R. T.], and the tenant or tenants will give the requisite consent thereto (*l*).

Nomination of referee recommended.

(*i*) The nomination of an individual of character, as the referee of questions of this nature, seems preferable to the ordinary plan of deferring the nomination until the occasion occurs.

(*k*) [See a more complete form ante, p. 26, and see p. 29 n.]

(*l*) Where an existing lease or tenancy extends to more than one lot, some arrangement as to the apportionment of the rent seems proper, to prevent disputes, as well between the respective purchasers, as between them and the tenant, who would not be bound by his lessor's apportionment. Vide ante, Vol. 4, p. 335. And the tenant ought, therefore, to be a concurring party in the arrangement. If the property is held by lease, and the vendors have a counterpart, it should be stipulated in whose custody such counterpart is to be placed. Vide ante, p. 7.

[11. MISCELLANEOUS CONDITIONS *of* SALE *adapted to various special circumstances.*

11. MISCELLANEOUS SPECIAL CONDITIONS OF SALE.

Vendor may give deeds in lieu of abstract.

I. AS the vendor's title deeds consist only of the original lease and an assignment indorsed thereon, he shall be at liberty (but shall not be bound) to deliver the original deeds to the purchaser in lieu of any abstract or copies thereof (*a*).

Title under inclosure and exchange.

II. The property having been taken in exchange by [A. B.], deceased, the father of the vendor, under an award made pursuant to an act of Parliament, Geo. 4, for dividing and inclosing the open and common fields of ——, which award is dated the —— day of ——, the abstract of title will commence with an extract from the award, and the purchaser shall not require any earlier title to be shewn, either to the property to be sold, or the property in respect of which it was awarded, or the allotments given in exchange, or the property in respect of which they were awarded, nor make any objection on account of such exchange, nor require any copy of the said act to be produced, or any evidence of the award having been made pursuant thereto (*b*).

Title under indiscriminate allotment.

III. As part of the premises consists of a close of —— acres, awarded, with other lands, on an inclosure in 18—, in lieu of lands and common rights held under different titles, without discriminating the specific portions awarded in re-

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Purchaser entitled to an abstract.

(*a*) [Sir E. Sugden says that a purchaser may insist upon an abstract, and is not bound to wade through the deeds. Where the conditions of sale of a leasehold estate provided that an abstract of the vendor's title should be delivered to the purchaser at the vendor's expense, and the vendor was not to shew the lessor's title, it was held, in an action of assumpsit against the purchaser for not completing his contract, that an allegation in the declaration that the vendor had delivered an abstract of title pursuant to the condition, was not sustained by proof that he had delivered the original lease and assignment, which constituted his only documents of title. *Horne* v. *Wingfield*, 3 Scott, N. R. 340. *Coltman*, J., subsequently granted leave to amend the declaration, for the purpose of letting in evidence that the defendant had, by parol, waived his right to an abstract; but observed that the case of *Howell* v. *Robinson*, 5 Scott, 196, (ante, Vol. 1, p. 413), seemed to shew that such evidence would not be admissible. Circumstances might justify a different determination in equity. *Price* v. *Dyer*, 17 Ves. 356; *Robinson* v. *Page*, 3 Russ. 114, ante, Vol. 1, pp. 355, 410, 416.]

(*b*) [See *Cattell* v. *Corrall*, 4 You. & C. 228.]

11. MISCELLANEOUS SPECIAL CONDITIONS OF SALE.

spect of the different titles, the purchaser shall not require any other title to be shewn than the title to the other premises purchased by him and the said award (*c*).

Lease of copyholds by license.

IV. The lease under which the vendor claims was granted under a license from the lord of the manor of ——; but the vendor shall not be required to make out or prove the title of the person granting such license (*d*).

Title disclosed by abstract open for inspection.

V. The purchaser of lot —— shall accept such title as is disclosed by the abstract thereof, which has been open to inspection at the office of Messrs. [*vendor's solicitors*], in ——, the vendor's solicitors since the —— day of ——, and shall not be entitled to require any further abstract or evidence of title beyond the verification of such abstract, subject to these conditions (*e*).

Such title as vendor has.

VI. The purchaser of lot —— shall accept such title as the vendor has.

VII. As to lot 5, the purchaser shall be satisfied with the execution of a conveyance by the vendor, and shall not require any title to be shewn, or make any objection on the ground of defect or want of title (*f*).

VIII. As to lot 6, the purchaser shall take such title as the vendor holds under the conveyance to him, and shall not require any other evidence of title than such conveyance (*g*).

Modus.

IX. The purchaser of lot —— shall not object to the validity of the said modus, on the ground of rankness, or on any other ground, nor require any proof in support thereof, beyond evidence of the payment thereof during the last —— years (*h*).

Grant from the crown.

X. The purchaser of lot ——, which is held under an old grant from the crown, shall not require any copy [or abstract] of such grant, [but only an intimation of the date thereof, and the place where it is to be inspected]; nor shall he require any deduction of the intermediate title, except for the

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(*c*) [Vide ante, Vol. 1, p. 76.]

(*d*) [See *Shepherd* v. *Keatley*, 1 C. M. & R. 117; *Hanbury* v. *Letchfield*, 2 Myl. & K. 629.]

(*e*) [Vide ante, p. 41, n.]

(*f*) [See *Freme* v. *Wright*, 4 Madd. 364; *Wilmot* v. *Wilkinson*, 6 B. & Cr. 511; ante, p. 41, n.]

(*g*) There is an obvious distinction between this condition and the preceding one, the purchaser being bound by one to accept the title, though bad; by the other, only not to require the title to be proved.

(*h*) Vide ante, p. 45, n.

last fifty years, nor any evidence of the identity of the lands included in such lot with the lands included in the said grant, nor any evidence of the exemption thereof from tithes, beyond a declaration by the occupier that no tithes have been paid or demanded in respect thereof during the last —— years (*i*).

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Sale of house of residence of clergyman under stat. 1 & 2 Vict. c. 23, s. 7 (*j*).

XI. The premises having been in the possession of the rectors of —— for more than a century, (of which fact the vendors shall not be required to give any evidence), the respective purchasers shall be satisfied by the vendors producing a title pursuant to the provisions of certain acts of Parliament under which the same are sold; and the premises are sold subject to the consent of the ordinary, patron, and archbishop being obtained for that purpose, and the respective purchasers shall be precluded from calling for any other title.

Deeds not in vendor's possession.

XII. The vendor shall not be required to produce or procure any original deed or document, or any attested or other copy thereof, not in his own possession, either for the verification of the abstract or otherwise (*k*).

Old abstract to be evidence.

XIII. The purchaser shall accept an abstract, which, from what purports to be the signature of counsel thereto, appears to have been examined in the year 18—, as sufficient evidence of the contents and due execution and attestation of two deeds therein abstracted, and stated to bear date in the years 18— and 18— respectively; such deeds being recited or referred to in a purchase deed, bearing date in 18—, which will be produced.

(*i*) [Vide ante, Vol. 1, p. 222.]

(*j*) [Amended by stat. 1 & 2 Vict. c. 29. See stat. 5 & 6 Vict. c. 26.]

Production of documents to verify the abstract.

(*k*) [This is a very stringent condition, and should not be resorted to except under peculiar circumstances. The doctrine in *Southby* v. *Hutt*, 2 Myl. & Cr. 215, (ante, Vol. 1, p. 100), was followed in the case of *Osborne* v. *Harvey*, 7 Jur. 229, where a condition that the purchaser should collate with the abstract such of the title deeds, &c., as were not in the vendor's possession, at the places where they were deposited, registered, or enrolled, and should not require them to be produced elsewhere, a condition that all copies, &c., of deeds, &c., for the purpose of verifying the abstract, should be prepared, sought for, and procured, by and at the sole expense of the purchaser, and a condition that the vendor should not be compelled to produce any original title deeds or other documents not in his possession or custody, were held, when taken together, not to preclude the purchaser from objecting that the holder of certain deeds refused to allow him to inspect them.]

11. MISCELLANEOUS SPECIAL CONDITIONS OF SALE.

Identity.

XIV. That no further evidence of the identity of the parcels shall be required, than what shall be afforded by the abstract (*k*), or the deeds, instruments, or other documents therein abstracted.

Descent—purchaser.

XV. As to lot — the purchaser shall not make any objection on the ground of want of evidence that the person under whom the vendor claims as heir at law was the original purchaser of the property, but shall be satisfied with evidence that the enjoyment and devolution of the property during the last forty years is consistent with that claim (*l*).

Sale by assignee of an equitable interest.

XVI. As the parties who were trustees of the said property, when it was assigned to the vendor, are now dead, the solemn declaration of the vendor, or of his solicitor, that notice of such assignment was given to such trustees within the week next following the date thereof, shall be sufficient evidence of the fact; (*or,* the purchaser shall not object to the want of evidence that due notice of the assignment to the vendor was given to such trustees, unless he can prove that prior notice of some subsequent and adverse assignment or incumbrance has been given to the trustees of the said property) (*m*).

Title by adverse possession.

XVII. As the vendor's title is rested on the adverse possession of a mortgagee, under the Statute of Limitations, the

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(*k*) [The vendor must take care, under such a condition, to state nothing in the abstract, with respect to the parcels, that he cannot verify; and where the description in some of the abstracted documents did not agree with the particulars of sale, it was held that the above condition did not preclude the purchaser from requiring further evidence. *Flower* v. *Hartopp*, 7 Jur. 613. Vide ante, p. 3.]

(*l*) [As to the reasons for a stipulation of this kind see a note to the precedent, No. 15, infra.]

As to notice to trustees.

(*m*) [See the doctrine of gaining priority by notice to trustees, fully discussed, ante, Vol. 5, p. 458; and see *Hobson* v. *Bell*, 2 Beav. 17. The difficulty raised in that case suggests the propriety, in taking an assignment of a charge upon an equitable interest, (whether in land or in personalty, for until the doctrine in *Jones* v. *Jones*, 8 Sim. 633, is confirmed, it cannot safely be relied on), not only to give notice to the trustees, but to obtain from them a written and dated acknowledgment of having received such notice, to be preserved as one of the documents of title; in which acknowledgment the trustees should also be required to state whether they have notice of any other incumbrance. Trustees sometimes refuse to give this information; but a purchaser is clearly entitled to insist on it as against his vendor; and there may be ground to contend that trustees refusing to give the information at the instance of their cestui que trust should be held to have committed a breach of trust.]

purchaser shall be satisfied with the solemn declaration of the vendor, that he has not, during the last twelve years, received or authorized the receipt of any interest from the owner of the equity of redemption, or acknowledged or authorized any acknowledgment of such owner's title; and the solemn declaration of the vendor's solicitor, that he was the solicitor for the mortgagee under whom the vendor claims, and has reason to know, and believes that there has been no such acknowledgment or receipt within the last twenty years (*n*).

Evidence of exemption from tithes.

XVIII. The solemn declarations of occupiers, that during the last —— years no tithes, compositions, or modus have been paid, rendered, or demanded, in respect of the several lots, shall be conclusive evidence that such lots are tithe free.

Evidence of tenure.

XIX. The premises are believed to be of gavelkind tenure, having been so treated thirty years ago; and the purchaser shall not object to the title on the ground that the premises are not of that tenure, unless he can prove the same (*o*).

General devise.

XX. The purchaser shall not require any evidence that Lot — was included in a general devise contained in the will of a testator, who died in the year ——, the subsequent enjoyment being consistent with the assumption that such lot passed by such will.

Presumption of merger.

XXI. A term of years which was assigned to attend the inheritance in the year ——, and is not noticed in any of the subsequent documents of title, shall be presumed to have been merged in the freehold.

Evidence of satisfaction of mortgage.

XXII. As to Lot —, the purchaser shall not require any other evidence of the satisfaction of a mortgage dated in 18—, than the production of a mortgage deed from the vendor's possession, and the vendor's solemn declaration that no payment or demand of payment of interest or principal has been made during the last —— years.

Execution by attorney.

XXIII. Where any deeds shall purport to have been executed by attorney, the vendors shall not be required to shew that the principal was alive at the time of execution.

Leaseholds for lives—Insurance.

XXIV. The life of Mr. L. M., who is one of the cestuis que vie named in each of the leases comprised in the first three

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(*n*) [See *Scott* v. *Nixon*, 2 Con. & L. 185; *Hobson* v. *Bell*, 2 Beav. 17, ante, p. 33.]

(*o*) [See some remarks by Mr. Bell, ante, Vol. 1, p. 135.]

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lots, and aged 37, is believed to be healthy and insurable, and he will appear at any office and concur in any insurance of his life (*p*).

Limits of title.

XXV. The purchaser shall not require, investigate, or object to the title prior to certain purchase-deeds of the —— and —— days of ——.

Recitals evidence.

XXVI. The estate comprised in these particulars having been sold under a decree of the Court of Chancery, with other estates in lots, the recitals contained in a certain indenture of release of the —— day of ——, (being the conveyance in pursuance of the said decree under which the vendor claims), shall be deemed sufficient evidence of the facts, matters, and things, and of the contents and execution of the several deeds and documents therein recited.

XXVII. Every recital or statement, whether of fact or conclusion of law, in any deed, will, or other document, dated thirty years prior to the day of sale, shall be sufficient evidence of the fact, conclusion, or matter, so recited or stated (*q*).

Statements in conditions.

XXVIII. All evidence which the purchaser may require for the verification of any matter stated as a ground or reason for any of these conditions, shall be procured, produced, and inspected, at his expense (*r*).

XXIX. Any evidence which the vendor may be entitled to require in verification of any statement contained in the —— condition, shall be procured at his expense.

Attested copy to be evidence, &c.

XXX. The production of an attested copy of the said indenture of release of the —— day of ——, shall be sufficient

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Mode of insuring where all the cestuis que vies will not concur.

(*p*) [Where a purchaser of several leaseholds held for different lives could not obtain the concurrence of his cestui que vie in an insurance; but C. M., who was a nominee in each of the leases, was willing to appear at an insurance office, and submit to examination, &c., the objection that, in case he did not survive his co-nominee in any lease, the interest of the purchaser in his life would fail as to that lease, and so avoid the policy, (according to the principle of *Godsal* v. *Boldero*, 9 East, 71; ante, Vol. 5, p. 303), was proposed to be obviated in this manner:—The life of C. M. was to be offered to a company for insurance, and, on its being accepted, they were to be requested to insure the life of the *survivor* of C. M. and his co-nominees, without investigating the health of the latter, and upon terms the same or somewhat lower than would have been required for insuring the life of C. M. alone; if the same terms, then no premium to be paid after his death.]

(*q*) [Vide ante, p. 3.]

(*r*) [Vide ante, p. 46, condition XII., and note.]

evidence of the contents and due execution thereof, and no objection shall be taken on account of the want of any covenant to produce the same, nor shall the vendor be bound to produce or procure any attested copy of, or covenant to produce any deed or document prior thereto, for any purpose.

Expense of attested copies.

XXXI. All attested copies of deeds, or documents of title, required by any purchaser, and to which he shall be entitled, shall be furnished, if his purchase-money do not exceed £——, at his expense; if his purchase-money exceed £——, and be less than £——, at the joint expense of the vendor and purchaser; or, if his purchase-money amount to £——, at the vendor's sole expense.

Sale by mortgagee.

XXXII. The vendor shall not be required to procure the concurrence in the sale or conveyance of any party interested in the equity of redemption of the property sold.

XXXIII. As the vendor sells under a power of sale, to be exercised in case a certain payment should not be made to him on a day fixed, the vendor's solemn declaration that such payment has not been made shall be sufficient evidence of the fact (*s*).

Sale under charge of debts.

XXXIV. As the vendors take the property subject to a general charge of debts, the purchaser shall not be entitled to require the concurrence, in the sale or conveyance, of any party entitled to any beneficial interest in, or incumbrance upon, the property; nor shall any intimation or notice to the purchaser that the debts charged upon the said property are paid, or that the said property is not required for payment of such debts, entitle the purchaser to require such concurrence (*t*).

Time for taking objections.

XXXV. Every objection or requisition which shall not be taken or made in writing within ten days after the delivery of such (*u*) an abstract as shall suggest the same shall be considered as waived; and if the purchaser shall make any

(*s*) [See *Hobson* v. *Bell*, 2 Beav. 17. The necessity for such a condition as the above is now generally obviated by the declaration in powers of sale, exonerating purchasers from the necessity of ascertaining that the occasion for selling has happened.]

(*t*) [See *Page* v. *Adam*, 4 Beav. 269; *Forbes* v. *Peacock*, 7 Jur. 688, 11 Mee. & W. 630; *Jones* v. *Price*, 11 Sim. 557; *Higgins* v. *Shaw*, 2 Dru. & W. 36; ante, Vol. 8.]

(*u*) [The word "abstract," if unqualified, means a perfect abstract. An objection which the purchaser was not naturally led to by the abstract, as originally framed, may be taken at any time within ten days after he first obtained the information suggesting it. *Blacklow* v. *Lawes*,

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objection or requisition as to title or evidence which the vendor shall not be able, or shall not think fit, to remove or comply with, the vendor shall be at liberty, by notice in writing to be delivered to the purchaser or his solicitor, to annul and put an end to the contract between them; and, in such case, the vendor shall, within one week after the delivery of such notice, repay to the purchaser his deposit-money, with interest thereon, at the rate of £4 per cent. per annum, with the auction duty paid by the purchaser, but without any costs or damages whatever (*v*).

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2 Hare, 40; ante, Vol. 1, p. 75. As it is not clear that *every* objection does not remain open until the abstract is perfected, the condition is qualified as above.]

As to waiver of conditions.

(*v*) [In *Page* v. *Adams*, 4 Beav. 269, the condition was that the purchaser's objections and requisitions should be made within twenty-eight days; "and if any such objections are made and not removed within fourteen days after the expiration of the twenty-eight days herein named, then" the vendor may annul. The purchaser having insisted on an untenable objection, the vendor was held to be entitled to annul the contract; but Lord Langdale, M.R., said, "I should have thought the notice to annul the contract invalid, if, in giving it, the defendant had sought improperly to escape from the performance of a duty which by the nature of his contract he was bound to perform." It is to be inferred that if the requisition had been such as the vendor was *unable* to comply with, he might have taken advantage of the condition. But where the vendor seeks by such a condition to protect himself from complying with requisitions which merely entail trouble and expense, he must frame it as in the text. Such a condition, however, is unnecessarily severe and alarming; and the object would be much better attained by investigating the title and framing proper conditions as to evidence, &c. Vide ante, p. 29.]

[In *Tanner* v. *Smith*, 10 Sim. 410, (see S. C. on Appeal, 4 Jur. 312), it was held that, under such a condition as the above, the vendor loses his right to rescind the contract, if he entertains the objections instead of rescinding at the first delivery of them; it being unfair to the purchaser to lead him into expense without giving him any security. Of course, if after such negotiation the vendor's title proves defective, the purchaser may rescind the contract on the ordinary terms. The principle in *Tanner* v. *Smith* was recognised and acted upon by Sir. J. Wigram, V.C., in *Morley* v. *Cook*, 2 Hare, 106; where it is said that such conditions ought to be discouraged. But see his Honour's observations on *Page* v. *Adams* (4 Beav. 269) in 2 Hare, 110. The vendor will not be allowed fraudulently to deliver an imperfect abstract; (Id.): but, it is presumed, his omission to render his abstract perfect by procuring evidence not in his possession could not be regarded as fraudulent. "I am not prepared to say," said his Honour, "that a skilful practitioner may not in all cases, by the addition of a few words in his answer to objections to title, such for instance as 'without prejudice,' [but see 7 Jur.

II. MISCELLANEOUS SPECIAL CONDITIONS OF SALE.

XXXVI. A tenant in tail of the property (now deceased) having, in 1823, suffered a common recovery to certain uses, and the vendor, who claims adversely to such recovery, having been advised by two eminent conveyancers (whose opinions may be seen at the office of Mr. ——, the vendor's solicitor), that the vendor's title is not affected by the said recovery, the purchaser shall not make any objection on account thereof (*x*). Proviso as to particular objection.

XXXVII. If the vendor shall file a bill for specific performance of the contract, both parties shall accept and be bound by the opinion of the Court (assisted or not by a case or issue at law) on any question of law or fact, and the purchaser shall not object to complete merely on the ground that the title is doubtful. Doubtful title.

XXXVIII. Both parties shall be bound by the opinion of one of her Majesty's counsel (to be chosen by lot out of a list of four, two to be named by each party, as to the title; and such counsel may, if he shall think fit, pronounce an opinion on the title, without regard to the rule in equity as to doubtful titles. Opinion of counsel to be binding.

1029], obviate the effect of the rule laid down in *Tanner* v. *Smith*." In *Cutts* v. *Thodey*, 6 Jur. 1027, Sir L. Shadwell again acted on the principle that a vendor, who enters into discussions with the purchaser respecting any objections, loses his right and the benefit of any condition as to the waiver of such objections, &c.]

[If the vendor wishes to be allowed to retain his right of insisting on the strict terms of his condition, after entering into negotiations, he should either make an express stipulation with the purchaser to that effect at the time of entering into such negotiations, or he should provide for the case in his conditions, by some such words as these :—

"That the vendor shall be entitled, at any time, to insist on the ——th condition as to waiver of objections or requisitions, notwithstanding his having entered into explanations respecting, or having offered or endeavoured to remove or comply with, any objection or requisition which he may have been entitled to regard as waived; and that the vendor shall be entitled to rescind the contract under the ——th condition, notwithstanding his having entered into explanations respecting, or having offered or endeavoured to remove or comply with any objection or requisition within the meaning of such condition."]

(*x*) [This condition precludes the purchaser from every species of objection to the title arising out of the recovery, even though it should prove to have been effectual. See *Corrall* v. *Cattell*, 4 Mee. & W. 734, 3 You. & C. 413, 4 Id. 228.]

11. MISCELLANEOUS SPECIAL CONDITIONS OF SALE.

Apportionment of rent, &c., of leaseholds sold in lots.

XXXIX. Lots 3, 4, 5, and 6 are held under one lease, and each purchaser shall take an assignment of his lot at the apportioned rent above mentioned, and shall give the usual indemnity against such rent and the covenants in the original lease in respect of his lot, to the other purchasers whether at this sale or at any future sale, by covenants and powers of distress to be comprised in their respective assignments, which are to be prepared by and at the expense of the respective purchasers. And each purchaser shall join in a similar indemnity to the vendor, by a deed to be prepared by the vendor at the expense of the respective purchasers in proportion to the respective amounts of their purchase-moneys.

XL. The purchaser to the largest amount shall take an assignment of the original lease, and shall grant under-leases to the other purchasers for the residue of the term wanting two days, at the several apportioned rents above mentioned, with all usual covenants and powers of distress for securing the payment of the apportioned rents and the performance of the covenants in the original lease in respect of the several lots, and for indemnifying the other purchasers and the vendor therefrom. Each under-lessee to execute a counterpart of the lease to him: such lease and counterpart to be prepared by the under-lessor at the under-lessee's expense. If any lot remains unsold, the vendor shall, at his option, stand in the place of the purchaser to the largest amount, or of a purchaser for less than the largest amount.

XLI. As all the premises to be sold are held under one lease at one entire rent, the rent shall be apportioned among the purchasers in the shares above mentioned, and the mutual indemnities and securities of the several purchasers and the vendor in respect of the original rent and covenants, whether by an assignment to the purchaser to the largest amount and under-leases to the other purchasers, or by under-leases only, and with or without counterparts or other deeds of covenant or indemnity, shall, in all respects, be effected according to the advice of counsel, to be appointed by the vendor on behalf of all parties, who is to draw the several deeds; and the expense of preparing all the deeds shall (whether all the lots are sold or not) be borne by the purchaser or respective purchasers in proportion to the amounts of their respective purchase-moneys (*y*).

(*y*) [For other conditions as to apportionment, vide ante, pp. 17, 20.]

11. MISCELLANEOUS SPECIAL CONDITIONS OF SALE.

Proviso where college leaseholds are sold in lots.

XLII. As lots 1, 2, 3, 4, and 5 are held under one lease from the master and fellows of ——, and the rents stated in the above particulars have been apportioned by the vendor, to the best of his judgment, according to the relative values of the lots, in case separate leases cannot be obtained, or until such leases can be obtained, all the leases shall be conveyed to two trustees, to be named by the major part in value of the purchasers, (or, if any lot remains unsold, by the vendor), upon trust for the respective purchasers, and to obtain renewals; and the purchasers (and, in case any lot remains unsold, the vendor) shall enter into mutual covenants to pay and to indemnify each other against the apportioned rents above stated as the rents to be paid by the several purchasers (*z*), and their relative shares of the fines for renewal, (such shares to be proportional to the above-apportioned rents), and to join in all necessary acts to obtain separate leases, and in the mean time, such covenants to provide, that if, upon the dropping of any life, to obtain a renewal, the fine shall be increased by reason of any improvement of any lot, the purchaser of that lot shall pay the whole of such increase; and that if separate leases can be obtained upon the terms of apportioning the rent and fine, or either of them, in different proportions from those above stated, every purchaser shall concur in such apportionment, and shall not be entitled to any compensation or indemnity from the vendor, or from any other purchaser, by reason of any such difference (*a*). The production of the last receipt for the rent reserved by the before-mentioned lease shall be deemed conclusive evidence of the performance of the covenants down to the period of such receipt.

Apportionment of rent-charge.

XLIII. The rent-charge of £—— in lieu of tithes, to which the estate comprised in the several lots is subject, shall be apportioned among the purchasers and (if any lot is unsold) the vendor, in the manner mentioned in the particulars, at the expense of the parties, in proportion to the respective amounts of the apportioned charges.

Reservation of right of way.

XLIV. The conveyance to the purchaser of lot 4 shall contain a reservation, or, at the option and in that case at the expense of the vendor, the purchaser shall execute a sepa-

(*z*) The vendor should apportion the rent according to the relative values of the lots.

(*a*) [See stat. 39 & 40 Geo. 3, c. 41 ; ante, Vol. 4, p. 246.]

11. MISCELLANEOUS SPECIAL CONDITIONS OF SALE.

rate deed of grant to the vendor, his heirs and assigns, and the owners and occupiers for the time being of the messuage and —— acres of land belonging to the vendor, and adjoining the west side of the yard included in lot 4, or of any part thereof respectively, and his and their agents, servants, and workpeople, of a perpetual right at all times to use and keep open for all purposes whatsoever, and at his and their option to repair, a road or way of the width of ten feet across the said yard, to and from any place on either side thereof, for cattle, horses, waggons, carts, carriages, and other vehicles, any change in the nature, use, or occupation of the messuages and lands at either extremity of the said road notwithstanding (*b*).

Proviso for payment of mortgage.

XLV. Lot —— is subject to a mortgage for £——, payment of which, with £—— for all arrears of interest, may, according to notice already given, be made on the —— day of —— next; and the purchaser shall retain the amount of £—— (*the principal and interest down to the day appointed for completion*) out of his purchase-money, and shall by his purchase-deed, or (if the vendor shall so require, and in that case at the vendor's expense) by a separate deed, covenant to pay the same on the day aforesaid, and to indemnify the vendor.

Purchaser to have possession on completion; if he cause delay to pay interest.

XLVI. Possession to be delivered to the purchaser on the completion of the purchase; but if any delay should arise in such completion, by reason of any act or default of the purchaser, such purchaser, though not entitled to the possession, shall be bound to pay interest at the rate of £—— per centum per annum on the residue of his purchase-money from the said —— day of ——.

Purchaser of life-interest in funds not to receive dividends prior to completion.

XLVII. The purchaser shall not be entitled to any dividend on the said sum or share of stock which shall accrue due or be payable on any day prior to the actual completion of the purchase.

Fixtures.

XLVIII. The purchaser shall pay for all the fixtures and things included in an inventory already made out and signed by the auctioneer, which may be seen at his office, according to a valuation to be made (at the expense of the vendor and purchaser in equal moieties) by two referees or their umpire in the usual way (*c*).

(*b*) [As to the necessity for these extensive words, see *Allan* v. *Gomme*, 3 Per. & D. 581; 11 Ad. & E. 760; stated infra.]

(*c*) [This condition is preferable in point of certainty to any con-

11. MISCELLANEOUS SPECIAL CONDITIONS OF SALE.

XLIX. Counsel having advised that the widow (aged 67 (*d*)) of the late owner of the property (who died in 18—), has accepted a benefit under his will, and thereby barred herself in equity from claiming any dower out of any part of the property, the purchaser shall not object that the said widow has any right to dower either at law or in equity, or both at law and in equity, or require any release thereof (*e*).

Counsel's opinion as to equitable bar of dower.

L. As upon a possible construction of a will, dated in the year 1772, a person who is now at the Cape of Good Hope, (of which fact the purchaser shall not require any proof), would be entitled to a proportion amounting to one-seventh of the purchase-money, the purchaser shall accept a covenant of indemnity by the vendors against any claim by such person or his representatives, such covenant to be contained in the conveyance; or, if the purchaser shall require a separate deed, the same to be prepared at the purchaser's expense.]

Indemnity as to part of purchase-money.

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dition respecting "fixtures" generally: it being almost impossible in any case to ascertain with precision what subjects come within that description. Vide ante, Vol. 4, p. 504; Vol. 5, p. 250.]

(*d*) [The vendor must be prepared to prove this statement.]

(*e*) [When it is stipulated that the purchaser shall be bound by the opinion of counsel already given, the vendor must be prepared to prove every statement contained in the case on which the opinion was given. If this cannot be done, the condition must be so framed as to provide against the difficulty.]

As to conditions of sale of personal property.

The foregoing precedents of conditions of sale are confined (with three exceptions, see pp. 23, 58, 66), to sales of interest in real estate. Such conditions, in regard to sales of personal property, (using this term as exclusive of leaseholds), afford but little matter for comment. As to life and reversionary interests in stock, or other trust funds, and also policies of life insurance, which are frequently the subjects of sales by auction, vide ante, Vol. 1, p. 84. Where the sale is of a life interest in stock in the public funds, and it is intended that the purchaser shall not have the dividends accruing between the date of the contract and its completion, an express stipulation to this effect should be inserted; otherwise the purchaser will be entitled to all dividends subsequent to the contract, this advantage being given him in consideration of the precarious nature of the property, which may determine in five minutes after the contract is entered into. See *Kenney* v. *Wexham*, 6 Madd. 355; *Anson* v. *Towgood*, 1 Jac. & W. 639. In the last case the dividend accrued the day after the sale. The auctioneer had stated that the purchaser would be entitled to the dividend; but Lord *Eldon* attached no weight to this fact, as the Court did not attend to such notice—"the mere babble of the auction-room, as it had been called."

Life and reversionary interests in stock, &c.

12. APPOINTMENT AND RELEASE IN FEE.

12. APPOINTMENT *and* RELEASE *in Fee by the* VENDOR *and his* TRUSTEE, *to the* PURCHASER *and his* TRUSTEE, *to* USES *to* PREVENT DOWER (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, in the year ——, BETWEEN [*vendor*], of &c., of the first part; [*ven-*

As to purchase-deeds in general.

(*a*) The title "Purchase Deeds" includes every species of assurance by which real or personal property is capable of being transferred, as grants, feoffments, bargains and sales enrolled, appointments, lease and release, demises, assignments, surrenders, agreements, &c. The peculiar properties of these instruments have been pointed out in other parts of the present work; and the observations upon particular clauses will be found in the notes to the precedents containing them. Where freehold lands of inheritance belong to the vendor, subject to the usual uses to prevent dower, namely, to such uses as he shall appoint, and, in default of appointment, to the use of himself for life, with remainder to the use of a trustee during his (the vendor's) life, with remainder to the vendor in fee, the conveyance is usually made either by appointment or by lease and release, and more commonly by both these modes of conveyance, the appointment and release being contained in the same deed; and this expedient is adopted, not for the purpose of appropriating the advantages respectively belonging to both these assurances, (for that of course is impossible), but the release is added to the appointment, from abundant caution, to guard against the possible event of the appointment being inoperative from non-compliance with the requisition of the power, in regard to the mode of its execution or attestation. This reason, however, only applies where the power requires the appointment to be executed or attested in an unusual manner; which being now very seldom (it ought never to have been) done, the practice of adding a release to an appointment probably will fall into disuse. The scheme in question supposes the appointment to be the preferable mode of conveyance, since it makes it the primary, and the release the secondary or auxiliary, assurance only. But this is a point on which a few observations may be made.

As to conveyances by appointment.

Relative advantages of an appointment and lease and release.

The advantage of an appointment is, that the conveyance is effected by a single deed, free from the stamp for a lease for a year, and the necessity of obtaining the concurrence of the vendor's dower-trustee is avoided; and to this must be added the important consequence that the purchaser takes the estate exempt from judgments affecting the vendor, [of which he had no notice. Vide ante, Vol. 5, pp. 64 a, 64 b; Vol. 1, p. 110.] Its disadvantages are, that the conveyance may possibly be void for non-compliance with the requisitions of the power, in regard to the execution or attestation of the instrument; and, it should seem, the vendor's

dor's trustee], of &c., of the second part; [*purchaser*], of &c., of the third part; and [*purchaser's trustee*], of &c., of the

12. APPOINTMENT AND RELEASE IN FEE.

covenants for title, &c., do not run with the land, so that no action could be sustained upon them by the purchaser's alienee. With respect to the danger of a defective execution, however, it is to be observed, that this can only arise when the power imposes some peculiar mode of execution or attestation, which, as already observed, is now usually avoided; and even if the instrument be inoperative as an appointment, it generally happens that there is an outstanding term, or a subsisting tenancy, so that the deed would take effect as a grant. The difficulty, however, in regard to the covenants for title not running with the land is not so easily disposed of. It arises out of the same principle as that on which the exemption from judgments is founded, namely, that the purchaser coming in under the deed creating the power, and not under the donee of the power, claims by a title independent of, and paramount to the latter, and therefore cannot, for want of privity of estate, claim the benefit of covenants entered into with him. (See Watkins' Conv. by Morley & Coote, p. 53, n., and the note infra). Whether, for this reason, it is expedient to relinquish the advantages attending this short, convenient, and efficacious assurance, would depend upon circumstances. If, from the state of the title, the covenants are not likely to be wanted, or, from the condition of the parties, they would, when obtained, be of little value, probably a purchaser would be unwise to make much sacrifice in order to annex them to the land. If the contrary be the case, and more particularly if a covenant for the production of title-deeds be among the covenants, which would be rendered covenants in gross by conveying the property by means of an exercise of the power, it seems better to take the conveyance by lease and release. It has never been decided, whether the fact, that covenants for title do not run with the land, forms a sufficient ground for a purchaser's refusal to perform the contract. It is probable, that the objection would be considered untenable. It seems to depend considerably on a previous question already adverted to, (ante, p. 47), and which is also undecided, whether the absence of covenants in any particular instance forms an objection to the title; for, if it does, then it seems to follow, that the difficulty, if not the impossibility, of suing on the covenants, in consequence of the right of action not being vested in the owner for the time being of the land, also constitutes such an objection. It should seem, from Sir *J. Leach's* observation in the case of *Barclay* v. *Raine*, 1 Sim. & Stu. 451, that the circumstance of *a covenant for the production of deeds*, entered into with an anterior owner, not running with the land, would render a title unmarketable; since his Honour very broadly lays it down, that a purchaser is entitled to a covenant for the production of all the deeds not delivered to him* ; and a covenant

As to covenants running with the land.

Importance of making covenants for the production of title-deeds run with the land.

* [The purchaser is entitled to a covenant for the production of every document which the vendor is obliged to state in his abstract, and which is not delivered up to him, except documents on record,

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Recital of conveyances to vendors by lease and release and fine.

fourth part: WHEREAS, by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, 18—, the release made between [A. B.], and

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on which he could sue only in the name of the covenantee or of his representatives, whom, after a considerable length of time, it might be impossible to find, and who, if found, would not be bound to allow their names to be used, could not be such a covenant as his Honour referred to. It must be remembered, that the late learned judge disclaimed the observation imputed to him in *Barclay* v. *Raine*, 1 Sim. & Stu. 449; thereby intimating an opinion, that, where an owner in fee enters into a covenant for the production of his title-deeds with a person entitled to other parts of the lands to which the deeds relate, such covenant runs with the land. This point is very important, because it embraces the common arrangement, by which, when an estate is sold in lots, the title-deeds are delivered to the largest purchaser, he covenanting with the other purchasers, or, (as in *Barclay* v. *Raine*) with the vendor, for their production.

The preceding observations lead to this practical conclusion, that, when it is deemed to be of importance that the covenants respecting the land should run with the land, and especially when one of these covenants is a covenant for the production of title-deeds, the conveyance from a vendor entitled under the ordinary uses to prevent dower, should be taken by way of lease and release, and not of appointment. And it may be also suggested, that when the covenants in question are to be entered into by a person in whom the legal inheritance is not vested, it may sometimes be advisable to clothe him with the legal estate for the mere purpose of imparting to his covenants the quality of running with the land, taking care, however, in cases where the old law applies, to avoid letting in the dower of the vendor's wife.

As to the junction of the dower-trustee.

When a vendor, claiming under the common uses to prevent dower, conveys by lease and release, the dower-trustee ought, in strict technical propriety, to be joined; for, as the fee-simple is professed to be conveyed, all the estates composing that fee should be got in; but this is frequently not attended to, the trustee's estate being only a remainder for the life of the vendor, expectant on the determination by forfeiture of the vendor's previous estate for life; and consequently, if there is any difficulty in procuring the trustee's concurrence, and sometimes even where this is not the case, the estate is left outstanding. (Vide ante, Vol. 3, p. 255).

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copies of court-rolls, wills proved in the ecclesiastical courts, and generally documents preserved in some general or quasi public repository, from whence copies may be obtained that will be admissible as primary evidence. (*Cooper* v. *Emery*, 10 Sim. 609; 8 Jurist, 181; ante, p. 9). Even assignees in bankruptcy are bound to furnish the purchaser with attested copies of the deeds which they retain, and to covenant for the production of the originals, so long as they remain in office. (*Ex p. Stuart*, 2 Rose, 210; *Ex p. Pocock*, 1 Dea. & Ch. 104).]

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[F.] his wife, of the first part; [C. D.], of the second part; the said [*vendor*], of the third part; and the said [*vendor's trustee*], of the fourth part; and by a fine sur conuzance de droit come ceo, &c., levied by the said [A. B.] and [F.] his wife, pursuant to a covenant contained in the said indenture of release, all and singular the —— and hereditaments hereinafter described, and intended to be hereby appointed and released, were conveyed and assured, *To such uses*, upon such trusts, and for such intents and purposes, as the said [*vendor*] should at any time, or from time to time, by any deed or deeds direct or appoint; And in default of such direction or appointment, *To the use* of the said [*vendor*] and his assigns, during his natural life, with a limitation to the said [*vendor's trustee*], his executors or administrators, during the life of the said [*vendor*], *Upon trust* for the said [*vendor*] and his assigns, with remainder *To the use* of the said [*vendor*], his heirs and assigns, for ever. AND WHEREAS the said [*purchaser*] hath contracted and agreed with the said [*vendor*] for the absolute purchase of the said —— and hereditaments hereinafter described, and intended to be hereby appointed and released, for an estate of inheritance in fee-simple in possession, at or for the price or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of the sum of £—— of lawful British money, paid by the said [*purchaser*] to the said [*vendor*], immediately before the execution of these presents, the receipt of which sum the said [*vendor*] doth hereby acknowledge, and from the same and every part thereof doth release and for ever discharge the said [*purchaser*], his heirs, appointees, executors, administrators, and assigns (*b*), the said [*vendor*], by virtue and in execution of the power or authority given or reserved to him by the hereinbefore-recited indenture of release, and of all other powers and authorities enabling him in this behalf, *Doth* by these presents direct, limit, and appoint, that all and singular the —— and hereditaments hereinafter described, and hereinafter expressed to be hereby released, or otherwise assured, together with all the rights, members, and appurtenances thereunto belonging, shall henceforth remain, continue, and be, to the uses, upon the trusts, and for the intents and purposes hereinafter declared

—of uses to prevent dower.

—of contract for purchase.

Testatum.

In consideration of £——, vendor appoints to the uses after declared.

(*b*) [As to acknowledging the receipt of the purchase-money, see note (*p*), p. 78, infra.]

12. APPOINTMENT AND RELEASE IN FEE.

concerning the same. AND THIS INDENTURE FURTHER WITNESSETH, that, for the consideration aforesaid, and also in consideration of the sum of 10*s.* of lawful money aforesaid, paid by the said [*purchaser*] to each of them the said [*vendor's trustee*] and [*vendor*], immediately before the execution of these presents, the receipt whereof is hereby acknowledged, the said [*vendor's trustee*], according to his estate and interest as such trustee as aforesaid (*c*), by the direction of the said [*vendor*], testified by his execution hereof, *Doth*, by these presents, (made, so far the same operate as a release, in pursuance of an act of Parliament passed in the fourth year of the reign of Queen Victoria, intituled "An act for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties"), bargain, sell, and release, and the said [*vendor*] *Doth* grant, bargain, sell, release, and confirm, unto the said [*purchaser*] (*d*) and his heirs (*e*), ALL THAT

Further testatum.

Vendor and his trustee release to the purchaser.

Words by which trustees convey, not material.

(*c*) It is usual to qualify a trustee's conveyance by words to this effect, but they may very safely be dispensed with. A person who appears on the face of a conveyance to be a trustee only, and who covenants merely that he has not incumbered, may fearlessly convey his estate by any of the ordinary words of assurance, not excepting the word *grant*, [as to which, vide ante, Vol. 4, pp. 113, 115; *Barber* v. *Harris*, 1 Per. & D. 360: *Hinde* v. *Grey*, 1 Scott, N. R. 123: *Granger* v. *Collins*, 6 Mee. & W. 458: *Line* v. *Stephenson*, 7 Scott, 69,] and without any qualification whatsoever. It is common to find persons perusing drafts on behalf of trustees, insisting, with much pertinacity, on the insertion or omission of words and phrases which are wholly unimportant, and such requisitions are usually acquiesced in, because, though unnecessary for the purpose of protection, they are not otherwise objectionable.

Release should be made to the purchaser.

(*d*) It is in general better to make the release to the purchaser than to the dower-trustee, for the reasons stated, post, p. 88. The only case in which this is impracticable is, where the purchaser is himself a conveying party, in consequence of his having some interest in the estate in another character, as in the case of a purchase by a mortgagee.

(*e*) [If for any reason it is thought proper to execute a lease for a year, omit the reference to the stat. 4 & 5 Vict. c. 21, and say, in this place—

Reference to lease for a year.

"in the actual possession of the said [*purchaser*] now being by virtue of a bargain and sale made to him by the said [*vendor*] and [*vendor's trustee*], in consideration of 5*s.* apiece, by indenture, bearing date the day next before the day of the date of these presents, for one year, to be computed from

12. APPOINTMENT AND RELEASE IN FEE.

(*describe parcels, consisting of lands and messuages*), Together with (*f*) all and singular outhouses, bridges, ways, waters, water-courses, trees, woods, underwoods, hedges, ditches, fences, profits, privileges, easements, advantages, rights, members, and appurtenances whatsoever, to the said hereditaments and premises, or any part or parts thereof, belonging or in anywise appertaining, or usually held, occupied, or enjoyed therewith; *And also*, all the estate, right, title, interest, claim, and demand whatsoever, both at law and in equity, of the said [*vendor's trustee*] and [*vendor*], respectively, in, or to, or out of the said ——, hereditaments, and premises, and every part thereof, with their appurtenances; *And also*, all deeds, papers, and writings relating to or in anywise concerning the title to the said hereditaments and premises, or any part thereof, either alone, or together with any other hereditaments of less value, now in the custody of the said [*vendor*], or which he can procure without suit (*g*): To HAVE AND TO HOLD (*h*) the said —— and hereditaments, and all and singular other the premises hereby released or otherwise assured, or intended so to be, with their appurtenances, unto the said [*purchaser*], and his heirs, for ever, to the uses and upon the trusts hereinafter declared concerning the same, (that is to say); To SUCH USES, upon such trusts, and for such intents and purposes, and charged and chargeable in such manner and form as the said [*purchaser*] shall, at any time, or from time to time, by any deed or deeds (*i*) direct and appoint; and in

Parcels.

General words for lands and messuages.

All the estate, &c.

And all deeds, &c.

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the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession."]

(*f*) [For general words for manors, vide ante, Vol. 6, p. 45.]

(*g*) [As to the custody and production of deeds, see note, p. 87, infra.]

(*h*) [As to the office and effect of the habendum, see note, p. 83, infra.]

(*i*) As the object is to give the purchaser as beneficial and unrestricted an ownership as possible, consistently with the exclusion of the dower, it seems desirable not to annex to the appointment the requisition of any particular mode of execution or attestation, but to make the power exercisable simply by deed. It is unnecessary to extend it to testamentary dispositions, for, as the will does not take effect until the purchaser's death, when the trustee's estate ceases, the power is not wanted for the purpose of over-riding his estate; and the interposed

Limitations should give a power of appointing by deed generally.

12. APPOINTMENT AND RELEASE IN FEE.

default of and subject to such direction or appointment, To THE USE of the said [*purchaser*] and his assigns, during the term of his natural life, without impeachment of waste; And immediately after the determination of that estate by any means, To THE USE of the said [*trustee*], his executors and administrators (*k*), during the natural life of the said [*purchaser*], *Upon trust* for the said [*purchaser*] and his assigns; And immediately after the determination of that estate, To THE USE of the said [*purchaser*], his heirs and assigns, for ever; [and to, for, or upon no other use, trust, intent, or purpose whatsoever;] [And the said [*purchaser*] doth hereby declare that his widow, if any, shall not be entitled to dower out of the said —— and hereditaments hereby released or intended so to be] (*l*); AND the said [*vendor's trus-*

Uses to prevent dower.

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estate of the trustee prevents the dower from attaching at all during the life of the purchaser, so that his heir or devisee would take the property exempt from the dower.

Mode of limiting estate of dower-trustee.

(*k*) The trustee's estate pur autre vie is more usually limited to his executors or administrators than to his heirs; because, in general, it is more easy to find an executor or administrator, and he is less likely to be under the disability of infancy, insanity, &c., than an heir; though, as such estates are not often required to be conveyed, disabilities of this nature produce but little practical inconvenience. There is also the possible event of the failure of heirs; which event, however, rarely happens, except in the case of bastards, who can have no heirs other than those which spring from themselves. Indeed, some practitioners prefer making the limitation to the heirs on account of the greater improbability that there should be a want of real than of personal representatives; but among persons of the class from which trustees are generally selected, it does not often occur that the amount of personal estate left by a deceased person is so inconsiderable as to render it unnecessary that administration should be taken out; and even if the estate be insolvent, a creditor commonly administers; nor is it certain that, within the compass of an estate pur autre vie, the representation will fail by death. And let it be observed, that, in all these cases, the defect may be supplied by obtaining from the Ecclesiastical Court a limited administration. It seems, however, not to be very material which mode of limitation is adopted; and this observation may *now* be made without any reservation in regard to cases in which the subject of the conveyance is a rent or other incorporeal hereditament, since it has been settled, that the 12th section of the Statute of Frauds (29 Car. 2, c. 3), vesting estates pur autre vie, of which there is no special occupant, in the executor or administrator, extends to incorporeal hereditaments. (Vide ante, Vol. 2, p. 10).

Dower.

(*l*) [The power of appointment and limitation to a trustee are introduced for the purpose of excluding the dower of a widow whose

tee,] for himself, his heirs, executors, and administrators, doth hereby covenant and declare with and to the said [*purchaser*] and his heirs, That he the said [*vendor's trustee*] hath not at any time heretofore made, done, executed, or permitted any act, deed, matter, or thing, whereby or by means whereof the said ——, hereditaments, and premises intended to be hereby released, or any part thereof, are or is charged, incumbered, or in anywise prejudicially affected in title, estate, or otherwise howsoever. And the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*purchaser*] and his heirs, That, notwithstanding any act, deed, matter, or thing whatsoever, made, done, or permitted to the contrary by the said [*vendor*], or any person or persons rightfully claiming through, under, or in trust for him, the said [*vendor*] and [*vendor's trustee*] now have in themselves, or one of them hath in himself, good right and absolute authority by these presents

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Covenant by vendor's trustee that he has not incumbered.

Vendor's covenants, that, notwithstanding any act by him, &c.

—he and his trustee have power to assure;

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marriage was on or before the 1st of January, 1834, and the declaration which follows, for the purpose of excluding the dower of a widow whose marriage was subsequent to that period. In order to prevent the necessity of inquiring whether the purchaser was married or not, and, if married, what was the date of his marriage, it is advisable to insert the dower limitations and the dower clause in every case.]

As to declaration excluding dower.

[There appears to be some difference of opinion as to the propriety of inserting the declaration against dower in conveyances, as a matter of course. (See 1 Hayes' Introd. Conv. 305). Sir E. Sugden has expressed an opinion, that, as the husband can charge, sell, convey, or devise his estate free from dower, or put an end to it by any deed, it would not be right, without the owner's authority, by a declaration in the conveyance, to prevent dower altogether; and asks why the wife's dower should be guarded against any more than a descent to a distant unknown relative? (2 Vend. 222.) It seems to be out of the province of advisers upon a purchase to take upon themselves without authority to interfere with what is a mere matter of family arrangement or settlement. A general declaration extending to all their client's lands, would be clearly out of their province, yet the same reason that is given for inserting the one, would require the other to be inserted, although by doing so an additional stamp would be incurred. The principal advantage likely to arise from inserting the declaration is one which has been overlooked, namely, that it excludes the very perplexing questions which may arise upon the 9th section of the Dower Act (3 & 4 Will. 4, c. 105), as to what is a devise of an estate or interest in land sufficient to exclude the wife's dower. This may be a sufficient reason for following what is certainly the prevalent practice, although, of course, in such a matter, the conduct of particular practitioners needs not be at all influenced by the practice of others.]

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to appoint and release or otherwise assure the said ——, hereditaments, and premises intended to be hereby appointed and released or otherwise assured, and every part of the same, with the appurtenances, unto the said [*purchaser*] and his heirs, for ever, to the uses hereinbefore declared concerning the same, according to the true intent and meaning of these presents; *And also*, that, notwithstanding any such act, deed, matter, or thing as aforesaid, the said ——, hereditaments, and premises intended to be hereby appointed and released, shall, from time to time, and at all times hereafter, remain to the uses hereinbefore declared concerning the same, and be peaceably and quietly held and enjoyed accordingly (*m*), without any eviction, interruption, or denial whatsoever from or by the said [*vendor*], or any person or persons whomsoever rightfully claiming any estate, right, title or interest, at law or in equity, in, to, or out of the said hereditaments and premises, or any part thereof, by, from, under, or in trust for him the said [*vendor*], or by or through his acts, defaults, privity, or procurement; And that, free and clear, or freely, clearly, and absolutely discharged from, or by the said [*vendor*], his heirs, executors, or administrators, effectually kept indemnified against, all former or other estates, rights, titles, charges, and incumbrances whatsoever, made, created or occasioned by the said [*vendor*], or any person or persons rightfully claiming from, through, under, or in trust for him, or by or through his acts, defaults, privity, or procurement; *And further*, that the said [*vendor*] and his heirs, and every person whomsoever, rightfully claiming any estate, right, title, charge, or interest, at law or in equity, in, to, or out of the said ——, hereditaments, and premises intended to be hereby appointed and released, or any part thereof, from, through, under, or in trust for him or them, will, from time

—that premises shall remain to the uses aforesaid;

—free from incumbrances by the vendor, &c.

For further assurance.

As to the proper form of the covenant for quiet enjoyment.

(*m*) If the limitations are simply to the purchaser in fee, or to such uses as the purchaser shall appoint, and, in default of appointment, to him in fee, the covenant that the grantors have right to convey is followed by a covenant for quiet enjoyment by the purchaser, his *heirs and assigns*, or by him, *his appointees, heirs, and assigns*, as the case may be; and the latter form is sometimes used where the limitations are, as in the text, to the ordinary uses to prevent dower: but, in this case, it is not quite correct, because the terms of the covenant do not include the estate pur autre vie of the dower-trustee. In such case the language of the covenant should be, that the lands shall remain to the uses before declared.

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to time, and at all times hereafter, on the request, and at the costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, or execute and perfect every such lawful act, deed, conveyance, or assurance in the law whatsoever, for more effectually or satisfactorily appointing, releasing, confirming, or otherwise assuring the said ——, hereditaments, and premises intended to be hereby appointed and released, and every part of the same, with their appurtenances, To the uses and in manner aforesaid, according to the true intent and meaning of these presents, as by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel in the law, shall be reasonably advised and required, [so as such further assurances, or any of them, shall not contain in them, or imply, any other or more general covenant or warranty than against the acts, deeds, and defaults of the person or persons who shall be required to make or execute the same (*n*): and so as the person or persons who shall be required to make or execute such further assurances, shall not for that purpose be compellable to go from his, her, or their usual place or places of abode]. IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first hereinbefore written (*o*)

(*n*) The words within brackets are evidently intended to have a restrictive operation; they assume that, without such a qualification, the covenantor would be compellable to enter into *absolute* covenants; but so far is this from being correct, that it has been decided that the covenantor, in a covenant for further assurance, cannot be required to enter into *any* covenants or warranty of title whatever. (*Coles* v. *Kinder*, Cro. Jac. 571; *Stanroyde* v. *Locock*, Cro. Jac. 115). The consequence of this doctrine is, that the words in brackets, instead of being restrictive, have a precisely opposite effect; as, by negativing the covenantor's obligation to enter into any covenants extending beyond his own acts, they *imply* an obligation in him to enter into covenants embracing those acts; to which, we have seen, the covenant in question would not be construed to extend. See the note on Covenants, infra.

Effect of the restrictive words usually added to a covenant for further assurance.

A purchaser cannot generally, under the covenant for further assurance, call for evidence or for the means of securing evidence, which he neglects to obtain at the time of completing his purchase. Ante, Vol. 1, p. 102.

(*o*) Forms of attestation adapted to various circumstances will be found under that title, ante, Vol. 3, p. 12. The dower-trustee should execute the deed, to prevent the possibility of his disclaiming the estate, which would have the effect of defeating the purpose for which it was created. It is clear that the mere fact of the trustee not having executed

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Receipt indorsed.

RECEIPT FOR PURCHASE-MONEY, TO BE INDORSED.

Received on the day of the date of the within written indenture from the within named [*purchaser*] the sum of £— sterling, being the consideration money within expressed to be paid by him to me the within named.

[*Vendor*].

Witness to the above-mentioned payment, and the signature of the said [*vendor*].

[*Witness*].

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the deed, by which the trust-property was vested in him, would not justify his representatives in refusing to convey the legal estate. *Goodson* v. *Ellisson*, 3 Russ. 583. In this case, though the co-heiresses at law of the trustee, by their answer, declared their belief that he had never accepted the trusts, yet no proof seems to have been adduced in support of the allegation. Vide ante, Vol. 3, p. 698.

Acknowledgment of receipt of purchase-money how far conclusive.

(*p*) The payment of the purchase-money should always be acknowledged in the body of the deed, as well as by a memorandum indorsed, though in equity neither of these is conclusive of the fact, but the vendor, notwithstanding such acknowledgment, is at liberty to shew that the money was not paid, [and retains his lien upon the estate, as against the purchaser and all persons claiming under him with notice of the non-payment of the money.] *Coppin* v. *Coppin*, 2 P. Wms. 291; see also *Hughes* v. *Kearney*, 1 Sch. & Lef. 132; *Grant* v. *Mills*, 2 Ves. & B. 306; [*Ryle* v. *Haggie*, 1 Jac. & W. 234; *Winter* v. *Lord Anson*, 3 Russ. 488; *Teed* v. *Carruthers*, 2 You. & C. C. C. 40. The receipt indorsed, or, it seems, a distinct circumstantial recital of payment in the body of the deed, is, under ordinary circumstances, sufficient to excuse parties subsequently dealing with the purchaser from inquiring whether the money has been actually paid. Vide ante, Vol. 5, p. 24; Vol. 1, p. 90. As to the suspicion which an unusual form of receipt should excite, see *Kennedy* v. *Green*, ante, Vol. 5, p. 490.] At law it is otherwise, for *there* the rule being, that a statement in a deed cannot be contradicted by parol evidence, the vendor is estopped from averring the fact of non-payment, in opposition to the acknowledgment in the deed. *Rowntree* v. *Jacob*, 2 Taunt. 141. This doctrine was very distinctly recognised in the case of *Baker* v. *Dewey*, 1 B. & C. 704, 3 D. & R. 99; where Baker, the plaintiff, proved the execution of a deed, whereby, in consideration of 50*l.* paid to him by Dewey, the defendant, the receipt of which B. acknowledged in the usual manner, B. assigned certain leasehold premises to D. Parol evidence had been given that no money passed, but that it was agreed that D. should work out the consideration-money in his trade of a plumber and glazier. A subsequent deed was executed by Baker, assigning other property to Dewey, in consideration of 250*l.*, the receipt of which was acknowledged in the body of the deed; but, by a separate agreement in writing, *not under seal*, it was stipulated that Dewey should retain 60*l.*, part of the consideration-money, and work it out. In an action of *assumpsit* by Baker

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against Dewey, for not performing this work, it was contended, that evidence of the non-payment of the money was not admissible in either of these cases, as it went to contradict the deed. *Bayley*, J., said—"A party who executes a deed is estopped in a court of law from saying that the facts stated in that deed are not truly stated. In this case, Baker has executed deeds, in which it is expressly stated, that the consideration for the purchase of the premises therein mentioned had been well and truly paid. He is precluded, therefore, from saying that any part of that money remains due as purchase-money. In point of fact, 50*l.*, which was the amount of the purchase-money in the first instance, and 60*l.*, part of the purchase-money in the second, were not paid. But it was stipulated that the defendant, who was a plumber and glazier, should do work in his trade, on account of the plaintiff, to that amount. The plaintiff is estopped by the deed from saying that the amount was not paid to him as purchase-money. He might be at liberty, however, to shew that, after the execution of the deed, part of the purchase-money was returned on the terms of doing certain work for the plaintiff." The learned judge then proceeded to shew, that the declaration contained no count applicable to such a case; and the Court therefore held, that the plaintiff must be nonsuited. [So in a recent case, where a policy of insurance was sold under a condition that, if the completion of the purchase were delayed beyond the 8th of June, 1835, the purchaser should pay interest on the purchase-money at five per cent. until the purchase should be completed, and the purchase was not completed until January, 1836, when the purchase-money and a sum calculated for interest was paid, and the vendor executed an assignment by deed containing a release of the purchaser from the purchase-money and every part thereof, it was held that this release barred the vendor from claiming a sum of 34*l.*, balance of interest, which had been miscalculated by his attorney. The interest was part of the purchase-money, and so within the words of the release. Had the condition stated nothing about interest, and when the day arrived an agreement for interest had been come to, that would have been a collateral agreement, [sed quære, as the case was not within the Statute of Frauds], and might have made a difference. *Harding* v. *Ambler*, 3 Mee. & W. 279.]

Harding v. *Ambler.*

Receipt indorsed not conclusive at law.

The receipt for the consideration-money, however, usually indorsed upon the deed, and signed by the vendor, not being under seal, works no estoppel; and therefore, if the deed itself does not, though the indorsed receipt does distinctly state the payment of the consideration-money, a party is not concluded from proving the contrary. Thus, in *Lambourne* or *Lampon* v. *Corke*, 1 D. & Ry. 211; 5 B. & Al. 606, a deed recited, that the defendant, being desirous of obtaining possession of certain premises, applied to, and prevailed on the plaintiff, to give him possession of the same; which the plaintiff accordingly did, *he, the defendant, having then agreed to pay unto the plaintiff the sum of* 40*l. for such possession;* and that the defendant had requested the plaintiff and A. to execute an assignment thereof; the deed then proceeded to state, that, in pursuance of such agreement, and "in consideration of the said sum of 40*l.* being now so paid to the plaintiff, *as hereinbefore is mentioned*, and also in consideration of 10*s.* apiece" to A. and the plaintiff,

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in hand &c., paid by the defendant, "the receipts of which said several sums" they, the said A. and the plaintiff, did severally and respectively admit and acknowledge, and from the same released &c. the defendant, the plaintiff and A. conveyed the premises to the defendant. There was also indorsed on the deed a receipt for the 40*l.* It was clearly proved, however, that the sum had never been actually paid; and on this evidence, the plaintiff, in an action for the 40*l.*, obtained a verdict; which the Court, on a motion for leave to enter a nonsuit, allowed him to retain. *Holroyd*, J., said—"The plaintiff is entitled to our judgment, unless he is estopped, either by the deed of release, or by the receipt indorsed on it. As to the latter, it is sufficient to observe, that, not being under seal, it cannot amount to an estoppel; but can only be evidence for the jury, capable of being rebutted by the other circumstances in the case. And if so, then, as it is admitted that no such payment has actually been made, this receipt becomes of no importance. As to the deed, it seems to me to depend upon the construction to be given to the words, 'In consideration of the sum of 40*l.* being now so paid *as hereinbefore is mentioned*.' If the deed had absolutely stated a payment, unaccompanied by such words of reference, the case would be very different. But here there are words of reference; and we must, therefore, look to the former part of the deed; and there we find no statement of actual payment, but only of an agreement to pay. It seems to me, therefore, that this does not amount to an estoppel, so as to shut out the plaintiff from proof of the truth of the transaction. Estoppels are odious in the law; and, being so, they ought not to be allowed, unless they are very plainly and clearly made out. This is not the case in this deed." [*Abbott*, C. J., said, "that the receipt in the witnessing part of the deed might be referred to the nominal considerations only."]

Bottrell v. *Summers.*

[In *Bottrell* v. *Summers*, 2 You. & J. 407, the conveyance to a purchaser recited that it had been agreed that 1400*l.*, part of the purchase-money, *should be paid* to a mortgagee, and 460*l.*, the residue, *should be paid* to the vendor. The consideration stated in the witnessing part was, "the sum of 1400*l.*" to the mortgagee at or immediately before the sealing &c., in hand paid &c., the receipt &c., and "the *said* sum of 460*l.*" by the purchaser paid to the vendor, *as before mentioned*, the receipt whereof, and also the payment of the mortgage-money, making together the sum of 1860*l.*, the vendor acknowledged &c. The deed bore a receipt indorsed for the full sum. It was held, that the vendor could recover a part of the purchase-money which had not been paid, in an action of debt on simple contract. The Court relied much on the difference in the terms in which the respective payments were acknowledged, and on the authority of the case of *Lampon* v. *Corke*, stated above. *Vaughan*, B., dissented from this judgment, which is certainly not altogether satisfactory, although quite as much so as that in *Lampon* v. *Corke*. The learned baron contended that the words "as before mentioned" referred to the prior description in the witnessing part of the payment to the mortgagee, "in hand well and truly paid &c." There appears to be no more inconsistency between a recital of an agreement that money shall be paid, and a subsequent statement in the operative part that it has just been paid, than there is between the recital of an agreement that

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the vendor *shall* convey, and the subsequent operative words importing an actual conveyance, yet it has never been contended that the words of conveyance are void as repugnant to the recital, or that they do not estop the grantor from denying his conveyance. The use of the word "shall" in the recital is, in fact, nothing more than a grammatical error, (which is not cured by the interpretation adopted in the cases under consideration), and, as Blackstone observes, it is held, that no unnecessary caution, that "mala grammatica non vitiat chartam." (2 Comm. 379). The cases illustrate the strong leaning of the courts against estoppels.]

Estoppel does not bind third persons.

It is to be observed, that estoppel only applies to the parties to an indenture, and not to third persons; so that, notwithstanding the most positive and explicit statement therein of the payment of the consideration-money, evidence may be adduced in an action between strangers of the fact of no money having actually passed. On this ground it has been held, that, in proving the settlement of a pauper, the production of an indenture of conveyance, expressed to be made for a pecuniary consideration stated as actually paid, does not conclude the opposite party from proving the real consideration to have been natural love and affection, no payment of money having taken place. *Rex* v. *The Inhabitants of Cheadle*, 3 B. & Ad. 833. [Ante, Vol. 1, p. 351. As to estoppels, vide ante, Vol. 4, pp. 124, 128; Vol. 7, p. 537; *Doe* d. *Butcher* v. *Musgrave*, 1 Scott, N. R. 451; *Moseley* v. *Motteux*, 10 Mee. & W. 533; *Baird* v. *Neilson*, 8 Cl. & Fin. 726. "In general the party granting is estopped by his deed to say he had no interest; but that general principle does not bind trustees not acting for their own benefit, but for the benefit of the public." Per *Ashurst*, J.: *Fairtitle* d. *Mytton* v. *Gilbert*, 2 T. R. 169. That dictum was made with reference to trustees acting under the powers of an act of Parliament, which was presumed to be known to all persons, and with which the matter relied on as an estoppel was inconsistent. But when there is no inconsistency between the deed and the act of Parliament, trustees for public purposes are bound by false statements, &c., as much as other persons. *Doe* d. *Levi* v. *Horne*, 7 Jurist, 38.]

Trustees for public purposes.

Carpenter v. *Buller.*

Estoppel by recital, when binding.

[In the recent case of *Carpenter* v. *Buller*, 8 Mee. & W. 212, the law as to estoppel by recital was thus laid down by *Parke*, B.:—"If a distinct statement of a particular fact is made in the recital of a bond or other instrument, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument and in an action upon it, it is not competent for the party bound to deny the recital, notwithstanding what Lord Coke says on the matter of recital in Co. Litt. 352. b.; and a recital in instruments not under seal may be such as to be conclusive to the same extent. A strong instance as to a recital in a deed is found in the case of *Lainson* v. *Tremere*, 1 Ad. & E. 792, 3 Nev. & M. 603, where, in a bond to secure the payment of rent under a lease stated, it was recited that the lease was at a rent of 170*l.*, and the defendant [in an action on the bond] was estopped from pleading that it was 140*l.* only, and that such amount

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had been paid*. So, where other *particular* facts are mentioned in a condition to a bond, as, that the obligor and his wife should appear, the obligor cannot plead that he appeared himself, and deny that he is married, in an action on the bond, 1 Roll. Abr. 873, c. 25. All the instances given in Com. Dig. *Estoppel* (A 2), under the head of 'Estoppel by Matter of Writing,' (except one which relates to a *release*), are cases of estoppel in actions on the instrument in which the admissions are contained. By his contract in the instrument itself a party is assuredly bound, and must fulfil it. But there is no authority to shew that a party to the instrument would be estopped, in an action by the other party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence. For instance, in another suit between the same parties, where a question should arise whether the plaintiff held at a rent of 170*l.* in the one case, or was married in the other, it could not be held that the recitals in the bond were conclusive evidence of these facts. Still less would matter alleged in the instrument, wholly immaterial to the contract therein contained; as, for instance, suppose an indenture or bond to contain an unnecessary description of one of the parties as assignee of a bankrupt, overseer of the poor, or as filling any other character, it could not be contended that such statement would be conclusive on the other party in any other proceeding between them." In the principal case, which was an action of trespass brought to try the title to a piece of land, it was held that a recital that the defendant was seised in fee of certain lands described by reference to a map, and, by such description, including the locus in quo, contained in a deed to which the plaintiff and defendant were parties, but which deed did not relate to the title to the lands, but only to an adit which it was proposed to construct, was not conclusive in that action. The Court thought that the stipulations respecting the adit were such as made the ownership immaterial, even for the purposes of the deed itself; but even had the recital been material, it would have been conclusive only in an action arising out of the deed. "The evidence of the circumstances under which the admission was made in no way contradicts the deed; it does not shew that such admission was not made, nor does it propose to alter it; but it tends to prove that the admission therein contained was inconsiderately made, and is not entitled to weight as a proof *of the truth of the fact* which it is used to establish." That privies in estate only are bound by estoppel, see *Doe* d. *Marchant* v. *Errington*, 8 Scott, 210; *Pitt* v. *Williams*, 5 Ad. & E. 885.]

Estoppel pleadable only in actions on the instrument itself.

Estoppels are mutual.

[A recital under seal will bind not only the party from whom it proceeds as an assertion, but also the opposite party as an admission. Thus, a recital in a lease of a will, and the lessor's title under it, binds the lessee who has executed the counterpart: *Bringloe* v. *Goodson*, 8 Scott, 71, where, apparently from the circumstance that the recital was not conclusive as to the identity of the will, the Court admitted it rather as evidence than as an estoppel.]

* [Upon good proof of the mistake, equity would reform the instrument. Vide ante, Vol. 1, p. 360.]

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Premises and habendum.

(*q*) That part of the deed which precedes the habendum is denominated the premises. Here are to be found the names of the grantor and grantee, and a description of the subject-matter of the grant. It is not usual or correct to mark the precise duration of the estate in this part of the deed, (Shepp. Touchst. 75), though commonly words of limitation, adapted to the nature of the estate subsequently limited by the habendum, are introduced. Thus, where lands are to be conveyed from A. to B. for an estate in fee, or for an estate pur autre vie, A. grants to B. and his heirs the parcels, to hold to him and his heirs for ever, or to him and his heirs during the life of C., as the case may be; but the omission of the words of limitation in the premises would be quite immaterial; indeed, if the name of the grantee were here wholly omitted, and the deed simply imported that the grantor conveyed the parcels, to hold to the grantee, his heirs, &c., the validity of the conveyance would not be affected. (*Butler* v. *Dodton*, Carey's Rep. Ch. 86; *Eeles* v. *Lambert*, Aleyn, 41). It is better, however, not designedly to omit the words in question, because, as we shall presently see, an error, which would be otherwise fatal in the habendum, might be corrected by the premises.

Office of the premises of a deed;

The office of the habendum is to limit the grantee's estate; and in modern conveyances, it is usually followed by a declaration of the use, which, being executed by the statute, the releasee or grantee to uses has only an instantaneous seisin, out of which the use is served. This seisin, it is obvious, should be co-extensive with, or at all events not less, in point of duration or extent, than the use so limited. If no express use is declared, it will result to the grantor, unless there be a sufficient consideration to rebut the resulting use, in which case the estate limited to the grantee by the premises or the habendum will remain in him.

—of the habendum.

[In *Strickland* v. *Maxwell*, 2 Cr. & M. 539, a printed form of a lease for one whole year, "and so on from year to year," had been altered by striking through the words "and so on," &c., and executed as altered, but some of the printed stipulations left unaltered were inconsistent with a tenancy for one year only; the Court, having regard to all the circumstances, held that the lease was for one year only. "The habendum," said *Bayley*, B., "is the proper place to look to for the purpose of ascertaining what period the parties had in their contemplation in making a lease, because it is generally the office of that part of the deed to fix the time during which the lessor grants that the lessee shall enjoy the demised premises. I agree that you may look at other parts of the instrument, and that, if you can see clearly that it must have been the intention of the parties that the lease should endure for a longer period of time than the habendum specifies, the other parts of the lease may control the habendum; but then it must be clear from those other parts of the lease, that it could not have been the intention of the parties that the habendum should operate according to the words. It must, however, be a strong case, and quite clear, that it could not be in the intention of the parties that he should hold for the term specified in the habendum."]

Habendum may be controlled by other parts of the instrument.

With respect to the rules that obtain where the premises and the habendum are repugnant, numerous decisions and dicta are to be found

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Premises and habendum.

As to repugnancy between the premises and the habendum.

in the books. (See 5 Com. Dig. 168, 14 Vin. Abr. 149.) Though these authorities are not all in perfect harmony, they agree for the most part in the position, that the habendum may explain or *enlarge*, but cannot *abridge*, the estate granted by the premises. Examples commonly adduced of the habendum being explanatory of the premises are, a grant to A. and his heirs, to hold to him and his heirs for the life of B., in which case A. takes an estate pur autre vie; Moore, 876; and a grant to A., B., and C., to hold to A. for life, remainder to B. for life, remainder to C. in fee; in which case A., B., and C. take the several estates expressed in the habendum. Dyer, 160 b. 361 b. So, under a limitation to A. and his heirs, to hold to him and the heirs of his body, A. will take an estate tail; Co. Litt. 21. a., [and, says Coke with a doubt, a fee-simple expectant. But in *Turnman* v. *Cooper*, Cro. Jac. 476, 2 Roll. 19, the authority for this position, the grant was to husband and wife, and to their heirs, habendum to them and the heirs of their bodies, remainder to them, and the survivor of them, for his life, *to hold of the chief lord*, with a warranty to them and their heirs; and the fee-simple expectant was held to pass, expressly on the ground of the tenure limited to the lord paramount, which could not be, if it were an estate tail, and of the warranty to the heirs general. In the absence of such special circumstances, there is no expectant fee. *Altham's case*, 8 Rep. 153; Perk. s. 170. If the premises are to A. and the heirs of his body, habendum to him and his heirs, it is said that he shall take a fee-simple expectant under the habendum. Co. Litt. 21. a. 8 Rep. 154. b.] In all these cases, the habendum is not repugnant to, but is explanatory of, the premises, shewing for what period, or in what manner, the persons named in the premises are to take; and in the last, describing the species of *heirs* of the grantee intended by the general term "heirs" in the premises, namely, heirs of the body. If the premises and the habendum expressly create estates of a different nature, that which confers the larger estate will prevail. Thus, under a limitation to A. for life, to hold to him and his heirs, he would take a fee-simple according to the habendum; while, in the converse case of a limitation to A. and his heirs, to hold to him for life, he would take the fee according to the premises; Co. Litt. 299. a., Plowd. 152, 8 Rep. 56 b, 14 Vin. Ab. 140, 2 Bac. Ab. 494; the distinction being evidently founded on the doctrine, that a deed is to be construed most strongly against the grantor. So, where a term of years was assigned to A. to hold from a certain future event, the "all estate" clause, which was inaccurately inserted in the premises, was held to control the habendum, and have the effect of vesting the intermediate interest in the assignee. *Jermyn* v. *Orchard*, Show. Parl. Cas. 207. Sed quære.

Effect of the "all estate" clause.

Burton v. *Barclay.*

[In *Burton* v. *Barclay*, 5 Moo. & P. 715, L., the owner of the fee, demised for twenty-one years to B., who afterwards demised to M. for the residue of the term, wanting twenty-one days; B. then, by deed-poll indorsed on the counterpart of the underlease, granted, sold, assigned, and transferred to L., his executors, administrators, and assigns, the within-written indenture of demise, and the messuage thereby granted, and all B.'s estate, right, title, interest, and term of years then to come, and unexpired possession, property, benefit, claim, and demand what-

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soever and wheresoever, of, in, and to the same premises, and the rent received by virtue of the within-written indenture, to have and to hold the said messuage and premises unto the said L., his executors, administrators, or assigns, from thenceforth for all such time or term therein as in the within-written indenture was mentioned. The Court, after observing that the parties could never have intended to destroy the mesne reversion, held, that there was nothing so necessarily repugnant in the habendum to the premises as to destroy the former, but that it restrained the grant in the premises to the term mentioned in the underlease ; so that the deed operated as a demise of the chattel reversion in B. to L. for the residue of the term of twenty-one years, wanting twenty-one days. This decision seems to overrule *Jermyn* v. *Orchard*, and some of the early authorities cited ante, Vol. 4, p. 319.]

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But these rules have lost much of their importance since the introduction and universal adoption of uses ; it is evident, that, in both the cases before suggested, if the habendum were followed by a declaration of the use, the nature of the estate which passed by the conveyance would be absolutely measured and fixed by that declaration. Thus, in the last-mentioned case, if the limitation were to A. and his heirs, habendum to A. for life, *to the use of A. for life,* notwithstanding the rule negativing the power of the habendum to restrict the premises, A. would take no larger estate than an estate for life, and the ulterior use would result to the grantor ; *Wilkins* v. *Perrat*, Moore, 876 ; and the resulting of the use would not be prevented by the fact of a valuable consideration having moved from the grantee to the grantor, because such consideration would be confined to, and satisfied by, the use actually limited. *Wilkes* v. *Leuson*, Dy. 169. See also *Goodtitle* v. *Gibbs*, 5 B. & Cr. 719.

Repugnancy in the premises or the habendum will yield to the intention collected from the whole instrument.

Questions, however, respecting the relative force of the premises and the habendum are sometimes brought into discussion by inaccuracies merely clerical, occurring in one or the other, producing a discrepancy which will necessarily render the deed void for uncertainty, unless it can be removed by the rejection or correction of the repugnant matter. At the present day, deeds are seldom held to be void on the ground of uncertainty, as the courts never come to this unsatisfactory conclusion until the failure of every attempt to reconcile the various parts of the instrument ; and if the intention, upon the whole instrument, be apparent, any repugnant or superfluous clause or expression, in *whatever part of the deed it be found,* would be rejected, in order to give effect to such intention. No technical rule, ascribing greater potency to the premises or the habendum, would be allowed to stand in the way of the application of this sound and salutary principle. Thus, if there be a palpable error in any part of the premises, which makes it inconsistent with the habendum, the rule often laid down, that, where the habendum is repugnant to the premises, it is to be rejected, would not prevent the Court from correcting the error in the premises, instead of rejecting the habendum. A direct illustration of this occurs in the case of *Spyve* v. *Topham*, 3 East, 115, where, by an indenture of release (preceded by a lease for a year) made between A., of the first part ; B., of the second part ; and C., (a trustee for B.), of the third part ; in consideration of 700*l.* to A. paid by B., and of 10*s.* paid by C., A., by the direction of B.,

Error in the name of the releasee rectified.

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granted *to B.*, in his actual possession, &c., the premises, to hold *to C.*, his heirs and assigns, to such uses as B. should appoint, and in default of appointment to B. and C., and the heirs of B. for ever; the estate of C. being in trust for B. *The lease for a year was made to C.*, the trustee; corresponding, therefore, with the habendum in the release, and not with the premises. The present action was brought by a purchaser to recover a deposit for a defect of title, arising from the alleged invalidity of this conveyance. The Court was of opinion that the words "unto the said C.," &c., in the premises, were to be rejected as repugnant to the habendum and the rest of the deed; and that, therefore, the objection to the title was untenable.

Remarks upon *Spyve* v. *Topham.*

Had the lease for a year in this case been made to B., the person named in the premises of the release, and not to C., the person named in the habendum, no doubt the Court, in order to support the conveyance, would have rejected the habendum, or, rather, have rectified it by reference to the other parts of the deed. Such an alteration, indeed, would have been in exact consistency with the rule already adverted to, that the habendum, where repugnant to the premises, is to be rejected; an instance of which occurred in the case of *Goodtitle* d. *Dodwell* v. *Gibbs*, 5 B. & Cr. 709; 8 D. & Ry. 502; where A., by lease and release, conveyed to B., and to his heirs and assigns, certain freehold hereditaments, to hold the same to the said B., his heirs and assigns, *from and immediately after the death of C.* It was contended, that this was a conveyance of a freehold in futuro, and, therefore, void; and though it was admitted, that the habendum was not essential to the operation of a deed as a grant, and might, if repugnant to an express grant in the premises, be void, yet it was insisted, that there the grant in the premises was general and indefinite, and not express, and that the habendum pointed out and explained the manner in which the grantee was to take, namely, after the decease of C.; and, consequently, the deed was void. But the Court was of opinion, that, in this case, an immediate express estate in fee *was* granted by the premises, and that the habendum, being inconsistent, and limited in terms which would defeat the deed, was to be rejected; and, for this construction, they relied on the cases of *Carter* v. *Madgwick*, 3 Lev. 339; and *Germain* or *Jarman* v. *Orchard*, Skinner, 528; Salk. 346; Show. P. C. 199, *S. C.*, where the habendum was rejected on precisely similar grounds. [See ante, Vol. 4, p. 319.]

Inconsistent words in the habendum rejected.

Partial repugnance.

[This rule is part of the more general rule, that, when two parts of a deed are inconsistent, the latter shall be rejected. (See *Furnivall* v. *Coombes*, 6 Scott, N. R. 522). Accordingly the habendum will only be rejected so far as it is repugnant to the premises: so much of it as may stand with the premises will operate and control them. Thus, where a lease was made to H. T., her heirs and assigns, to have and to hold to the said H. T. and her assigns for the life of G. T., it was held that H. T. took an estate for the life of G. T., descendible to her heirs as special occupants. *Doe* d. *Timmins* v. *Steele*, 12 Law J., N. S., 272—Q. B. See ante, p. 84; *Pilsworth* v. *Peyt*, 2 Jon. 4. A lease to A. & B., habendum to A. for life, remainder to B. for life, is good, because the habendum is not inconsistent either with the premises or with the rules of law. Co. Litt. 183. b.; 2 Rep. 55; Cro. El. 25, 89. But a lease to A., habendum to him and B. & C. (who are not parties) pro termino

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vitæ eorum et alterius eorum successivè diutius viventium, is void, for B. & C. cannot take immediately, being strangers, and not named in the premises*; nor by remainder jointly, because they were to take successively; nor successively, because the first taker was not ascertained. *Windsmore* v. *Hobart*, Hob. 313.]

Effect where limitation, either in premises or in habendum, is void per se.

[The distinction appears to be that when the premises contain no limitation of estate, the grantor could only take an estate by implication of law, and if the habendum contain an express limitation of estate, the implication from the premises is necessarily and effectually excluded, whether the intention expressed in the habendum can take effect or not; so that the validity of the deed in that case depends upon the validity of the habendum. But, where the premises express an estate, this will not be annulled by any subsequent matter, and the habendum can only take effect if it express a legal intention not absolutely inconsistent with the premises. On the other hand, if the premises limit a freehold estate, which the deed, for want of some formality or circumstance, is incapable at the time of delivery of passing, and the habendum limit an estate for years which may pass by the instrument, the latter shall take effect though it is inconsistent with the premises. And the supplying, at a time subsequently to the delivery, of the omitted ceremony, (as enrolment or livery of seisin) will not alter the construction, or divest the estate which had previously vested under the habendum. See 2 Rep. 24 a., 55, a. *Earl of Derby* v. *Taylor*, 1 East, 502; 2 Sanders on Uses, 314, 4th ed., 154, 5th ed:]

Custody of deeds.

Observations upon the clause granting the deeds.

(*r*) According to the old authorities, a feoffee was entitled to have the title-deeds delivered to him in order to defend his possession, unless the feoffor had entered into a *general* warranty; in which case, as the feoffor had taken upon himself the entire risk of defending the title, it was considered that he ought to retain the deeds. See Co. Litt. 6. a. *Hooper* v. *Ramsbottom*, 6 Taunt. 12; [*Buckhurst's case*, Moore, 488, 1 Rep. 1, where Popham, J., after laying down the distinction as to feoffments, added, that if the grant be of a thing which can only pass by deed, as rent, &c., then the second grantee may hold the original deed of grant against the first grantee, although the latter has not granted the deed to him and has entered into a general warranty; and that exemplifications of records, constats, transcripts of fines, court-rolls, pedigrees, recitals, surveys, accounts, and such like, are not material evidences to defend titles paramount, but pass to the terre-tenant without grant. In the same case it was said, that where A. and B. are joint tenants for life, remainder to B.

When grantee must be named in the premises.

* [A person may take an estate by remainder who is not a party to the deed, or not named in the premises; and if no person is named in the premises, one who is named for the first time in the habendum may take an immediate estate; but, if any other person is named in the premises as grantee, no new grantee can be added in the habendum, unless in correction of an evident clerical mistake. *Brookes* v. *Brookes*, 2 Roll. Ab. 67; Vin. Ab. *Grant* (K.), Co. Litt. 7. a.; Harg. Co. Litt. 26. b., n. (4); *Spyve* v. *Topham*, supra. Nor can a new subject-matter be added in the habendum, Touch. 76. But an exception (which must not be repugnant, ante, Vol. 4, p. 316) may be contained in the habendum.]

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in fee, and the deeds are delivered to B., he shall have them during his life, but after his death A. surviving shall have the deed by which his estate was created, and the heir of B. shall have the prior deeds. A jointress or dowress, after her estate is confirmed, cannot retain the deeds against the heir, 9 Rep. 16; 1 Salk. 252; *Tourle* v. *Rand*, 2 Br. C. C. 652. But it seems to be otherwise of a tenant by the courtesy. Co. Litt. 226. a.; 1 Ves. jun. 76.] A similar right of retaining the deeds would probably be held to exist, where the grantor retains part of the estate; *Field* v. *Yea*, 2 T. R. 603*; [so laid down in Bro. Ab. *Chart. de T.* pl. 53. Whoever has any land contained in the deed whereby others have the residue, may, on account of the parcel that he has, retain the deed; Id.; see Fitzh. N. B. 138 (G). After partition a coparcener cannot detain deeds which have no relation to the title to his specific allotment. Vin. Ab. *Faits* (A. a). Upon partitions by decree it seems to be the practice to order the deeds to be deposited with the Master for the benefit of all parties, *Trodd* v. *Downes*, Seton on Decrees, 188.] So, where the grantor has entered into an unqualified covenant for the production of the deeds to a third person, he would probably be allowed to retain them (in the absence of an express grant) even at law. Upon the principle of the reasoning in question, the purchaser, in a modern conveyance, would (unless in the excepted cases just noticed) be entitled to the custody of the deeds, independently of any express grant of them, as the covenants in such conveyances are almost invariably limited to the acts of the vendor himself.

Whether the deeds pass with the land to cestui que use.

It is usual, however, to insert an express grant of the deeds; and the insertion of such a grant is advisable, the rather because it has been made a question whether, in a conveyance taking effect by force of the Statute of Uses, the right to the deeds resides in the releasee to uses, or passes with the land by the operation of the statute to the cestui que use. A very respectable writer has considered it to be a point clearly settled, that the feoffee or grantee to uses is entitled to the custody of the deeds, because the statute only transfers the legal estate to the use, and does not interfere with the title-deeds; 1 Sand. Us. 122; and the early authorities appear to support this opinion; *Estofte* v. *Vaughan*, Dy. 277 a; *Sacheverell* v. *Bagnoll*, Cr. El. 356; *Earl of Huntington* v. *Mildmay*, Cro. Jac. 217; Roll. Ab. *Faits* (Z) 3; *Stockman* v. *Hampton*, Cro. Car. 441; *Sir W. Jones*, 377; *Welbie's case*, Noy, 145; *Reynell* v. *Long*, Carth. 316; *Warwick* v. *Braddon*, 3 Keb. 711; though it has had

Case of *Field* v. *Yea*.

* This was a strong case, the circumstances being as follow:—A., the defendant, purchased part of a leasehold estate, the residue of which was in mortgage, taking from the vendor a covenant for the production of the deeds, which were in the hands of the mortgagee. He afterwards obtained an assignment of the mortgage, and by that means got possession of the deeds in question. He then transferred the mortgage to the plaintiff; but the deed of transfer contained no grant of the deeds, which were retained by the defendant. The plaintiff (the transferree of the mortgage) brought an action of trover against the transferror, on account of the detention of the deeds; but the Court held, that he could not recover them, because the defendant had as good a title to them as himself, (though it will be remembered, that he acquired them in the character of, or as representing, the mortgagee).

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at least one learned dubitant; Harg. n. Co. Litt. 6. a.; [and see 2 Sugd. Vend. 104, and *Lord Sheffield's case*, Godb. 323]; and there might seem to have been strong ground to contend, that the statute, having transferred the legal estate to the use, had transferred it with all its incidents, of which the right to the title-deeds is one. [The law appears to be well settled in accordance with the old authorities; see *Whitfield* v. *Fausset*, 1 Ves. sen., 387. Thus, it is firmly established that a cestui que use need not in pleading make profert of the deed under which he claims, so that, in pleading a lease and release, he must make profert of the release, but not of the bargain and sale for a year. *Jenkins* v. *Peace*, 6 Mee. & W. 722.] The question, however, always may be avoided by inserting an express grant of the deeds, and such grant should be made *to the purchaser himself*, who is then entitled quâcunque viâ datâ; for, if it be made to a releasee to uses, who is not the purchaser, the question will arise whether such releasee is entitled to the custody of the deeds under the grant, or whether they pass with the estate to the cestui que use by the operation of the statute. Where the release to uses, therefore, is made to the dower-trustee, and not to the purchaser, (as it necessarily is when the latter is a conveying party), the grant of the title-deeds should be removed from its ordinary position, and inserted in a separate clause; though this is not often done in practice. Indeed, many practitioners never insert a grant of the deeds, and it might properly be omitted, were it not for the point first above adverted to; for it should be observed, that, whatever question may exist, as to whether, in a conveyance to uses, the right to the deeds is in the releasee or the cestui que use, there is no doubt as to its vesting in one or the other, though Mr. Sanders's position, already cited, has sometimes been strangely misconstrued into an expression of a doubt of this nature.

Custody of the title-deeds belongs to the legal owner of the property.

The doctrine, that a conveyance of lands carries with it the legal right to the custody of the title-deeds, was recognised in the case of *Harrington* v. *Price*, 3 Barn. & Adolph. 170, the facts of which were briefly as follow:—In 1803, A. sold and conveyed the estate in question to B.: in 1812, B. conveyed it to his nephew C., who, in 1826, sold and conveyed it to D., the plaintiff. A., the original vendor, retained the deeds on account of a claim of quit-rents, made by the lord of the manor, which was afterwards settled. In 1824, C. brought an action of trover against A. to recover the deeds, and obtained a verdict, but the judgment was not docquetted until 1827. A. avoided the execution of the *fi. fa.* in this action by absconding, and afterwards mortgaged the property to and deposited the deeds with E., who had no notice of the previous transactions. The present action was brought by D. against E. for the recovery of the deeds, and he was held to be entitled to a verdict, on the ground of the general doctrine, that whoever was entitled to the land was also entitled to the deeds affecting it; and that this legal right was not taken away by the neglect of B. in leaving the deeds in the hands of his vendor, that of the defendant being at least equal in not inquiring as to the possession of the lands before he lent his money.

[In accordance with the principle of the last case, it has been held, that where A. delivered to a conveyancer the title-deeds of an estate, of which he was seised jure uxoris, in order that the property might be conveyed to such uses as the wife should appoint, and, in default of

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appointment, to a son of the depositor and his wife in fee, and such conveyance was executed accordingly, the depositor could not maintain an action of detinue for the recovery of the title-deeds, because he was no longer the owner of the property. *Phillips* v. *Robinson*, 12 Moore, 308. See *Lightfoot* v. *Keene*, 1 Mee. & W. 745.]

Custody of deeds.

Rights of tenant for life.

[Generally the party who has an immediate claim under a deed is entitled to the possession of it. 3 Bingh. N. C. 680. But the old authorities are not quite consistent even on this point; and there is still greater diversity among them as to the right to the prior deeds, which, however, it is settled, belong to the freeholder if they relate to the freehold, and can never be claimed, unless under an express grant, by a mere termor, although he is entitled to the possession of the land. *Wiseman* v. *Westland*, 1 You. & J. 117; *Austin* v. *Croome*, 1 Car. & M. 653. But where the whole estate of the grantor passes, the right to the deeds passes with it, although the estate is merely a term of years. *Hooper* v. *Ramsbottom*, 6 Taunt. 12. It is laid down that the owner of the fee-simple may dispose of the charters as he pleases, and, if he give them away from his heir, the latter shall not recover them, though he takes the estate. Per *Gawdy*, J., *Kelsack* v. *Nicholson*, Cr. El. 496. So, if, in a settlement, the deeds are granted to a remainderman, the tenant for life shall not have them, and such a grant even by parol is good. Co. Litt. 232. But a tenant for life or in tail cannot grant the deeds away from the remainderman or issue. Bro. Abr. *Faits*, pl. 86, *Charters de Terre*, 36. If a lease for life is made, the remainder over in fee, this deed appertains, it is said, to the lord during his life, and not to him in remainder. Bro. Abr. *Chart. de T.* 16, 34; sed quære, for he says, that, after the death of tenant for life, the deed belongs to him in remainder; and if there are several remainders over, any of the remaindermen who first gets the deed shall detain it. Id. 6, 9. At the present day, it is settled, (subject to the anomalous rule discussed above, excluding the title of cestui que use, at law), that the immediate freeholder has, both at law and in equity, a primâ facie title to the possession of the deeds. *Banbury* v. *Briscoe*, 2 Ch. Cas. 42; *Ford* v. *Peering*, 1 Ves. jun. 76; *Strode* v. *Blackburne*, 3 Ves. 225; *Knott* v. *Wise*, 8 Ves. 323; *Tourle* v. *Rand*, 2 Br. C. C. 650; ante, Vol. 5, p. 477.]

Tenant for life.

[Although every person having a freehold interest, under a settlement or will, has primâ facie a right to the custody of the title-deeds, in order to defend the possession; yet Lord *Hardwicke* has said, it was the common practice for the Court of Chancery to direct the title-deeds to be taken from the tenant for life, and deposited in Court, for the security of a remainderman, whose interest was expectant on a mere tenancy for life; but more especially if the first tenant for life were the heir at law, as he might destroy the deeds in order to better his estate. *Ivie* v. *Ivie*, 1 Atk. 431; *Reeves* v. *Reeves*, 9 Mod. 132; *Smith* v. *Cooke*, 3 Atk. 382; *Southby* v. *Stonehouse*, 2 Ves. sen. 617; where Lord *Hardwicke* entertained a bill by a person claiming upon the construction of a will to be remainderman in fee expectant on an estate for life, seeking to have care taken of the deeds, and to restrain the tenant from committing waste. The plaintiff failed in establishing the construction he contended for, but it was taken for granted, that, had he done so, the relief would have followed. In *Papillon* v. *Voice*, 2 P. Wms. 471, the plain-

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tiff claiming an estate tail in land, and money to be laid out in land, and seeking to have the money invested and the writings delivered to him by the executor, was held, upon the construction that he took a life estate only, not entitled to the latter relief; but the deeds were ordered into Court. It being subsequently decided that he had an estate tail, the writings were delivered out to him. In *Pyncent* v. *Pyncent*, 3 Atk. 571, upon a bill by a son, remainderman in tail under a settlement made by his grandfather, the father being tenant for life, to have the deeds brought into Court, Lord *Hardwicke* said—"As to the relief prayed, it is the first I ever saw of its kind; such applications have been made against a jointress by a remainderman, and, upon agreeing to confirm her jointure, the Courts have done it, or where the remainderman is a stranger to tenant for life it may have been done, but not when it is under a settlement made by a grandfather, the father tenant for life, without impeachment of waste, and the son remainder in tail only, remainder in fee to the grandfather. Indeed, if there was evidence that the father was destroying of deeds, in order to enlarge his estate, the Court might then take care to put the deeds out of his power. But the Court, in general, is not very inclinable to direct title-deeds of a family, which are often very numerous, to be deposited in a Master's hands, because, they being subject to mortality, the deeds are very often lost and mislaid, to the great detriment of families; and, therefore, I should think some third person and secure place, agreed upon by all parties, would be a much properer depository on such occasions." See *Lord Lempster* v. *Lord Pomfret*, 1 Dick. 238; Amb. 154; *Crop* v. *Norton*, 2 Atk. 74; *Anon.*, Gilb. Eq. Rep. 1.]

[But on a motion that the deeds might be kept in court for safe custody, Lord *Northington* refused to order it; observing that it was his opinion, that the tenant for life should have the possession of the deeds, except when brought into court under an order of court for safe custody. *Webb* v. *Lord Lymington*, 1 Eden, 9: *Webb* v. *Webb*, 1 Dick. 298; 8 Ves. 322: see also *Lord Lempster* v. *Lord Pomfret*, Ambl. 154. What was said in *Hicks* v. *Hicks*, Dick. 650, that when the title-deeds are in the hands of the tenant for life, the Court of Chancery will not take them from him, but when they are not in his hands, the Court will not order them to be delivered to him, does not seem to be founded on any reason; the primâ facie title of the tenant for life may be actively asserted as well as by way of defence: see *Hotham* v. *Somerville*, infra. The report of *Hicks* v. *Hicks* is not to be depended on. See 1 Eden, 9, n., 1 Ves. jun. 77. In *Ford* v. *Peering*, 1 Ves. jun. 77, upon the early authorities being pressed, Lord *Thurlow* said, "Though the counsel thinks it so much of course to compel tenant for life to deliver up the title-deeds, I will look into the cases upon that:" but he added, that where the tenant for life was satisfied, and did not care about the deeds, but the remainderman was not satisfied, the Court would take care of the deeds, and not leave them in the hands of third persons who have no right to them, to the prejudice of the remainderman. But the settled practice now is, to leave the tenant for life in possession of the deeds; or, if they are in court for any temporary purpose, to deliver them to him on that purpose being satisfied, unless some substantial reason exists for depriving him of their custody. *Webb* v.

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Webb, Dick. 298. Of course the person who seeks possession of the deeds must shew an undisputed and clear title. If another is adversely in possession he cannot file a bill for recovery either of possession or of the deeds; he must first recover at law, and will only be allowed discovery of such deeds as he may shew to be material to enable him to recover. *Crow* v. *Tyrrel*, 3 Mod. 181; *Jones* v. *Jones*, 3 Meriv. 172; see 4 Ves. 70. In *Duncombe* v. *Mayer*, 8 Ves. 320, Lord *Eldon* directed the title-deeds of an estate to be delivered out of Court to the trustee, upon the application of the trustees and the tenant for life, founded on the above-mentioned authority of Lord *Northington*. See the cases there cited. *Bowles* v. *Stewart*, 1 Scho. & Lefr. 223.]

[It has been said that equity will oblige a tenant for life to deliver deeds to the heir, he confirming the life estate; yet if there are any *mesne* remainders in tail, as long as there is a possibility of issue, the Court will not order them to be taken out of the hands of the tenant for life. *Joy* v. *Joy*, 2 Eq. Ca. Abr. 284, pl. 4. This will be done in case of a jointress, upon her jointure being confirmed. *Ford* v. *Peering*, 1 Ves. jun. 76.]

[In *Lord Banbury* v. *Briscoe*, 2 Ch. Cas. 42, the tenant for life under a settlement filed his bill against a party in possession of the deeds, who claimed a charge under the settlement, seeking to have the deed of settlement delivered to him. Lord *Nottingham* said, if tenant for life have a deed, whereby the reversion and inheritance is in another, he may at law retain the deed against the reversioner; and ordered that the settlement should be brought into Court for safe custody, and that both parties should have the use of it, with liberty to take copies attested. See *Crop* v. *Norton*, 2 Atk. 72.]

Hotham v. *Somerville.* Tenant in tail in possession entitled to deeds in preference to trustees under a prior term for raising portions.

[A termor or annuitant cannot in equity retain the deeds against the freeholder. *Churchill* v. *Small*, 8 Ves. 323; *Whitfield* v. *Faussett*, 1 Ves. sen. 394; *Harper* v. *Faulder*, 4 Mad. 138. In the recent case of *Hotham* v. *Somerville*, 5 Beav. 360, Lord *Langdale*, M. R., held, that a tenant in tail in possession under a settlement was entitled to the possession of the deeds in preference to the trustees of a prior term for raising portions, and consequently in preference to mortgagees claiming under them. The circumstances were these. At the death of the tenant for life the deeds were in the hands of White & Carew, his executors, the estates being limited to W. H. and F. Somerville, as trustees to preserve contingent remainders; remainder to F. Somerville and White (one of the firm of White & Carew) for a term of 500 years, in trust to raise a portion for a child by the first wife of the tenant for life; remainder to other trustees for a term of 600 years, in trust to raise a jointure and portions for his second wife and her children; remainder to W. B. Hotham in tail. Under a decree in a suit to ascertain the rights of parties, a mortgage by demise was made by the trustees of 500 years' term: "in the treaty for the mortgage it was assumed," said Lord *Langdale*, "as I think without sufficient reason, that White & Carew held the deeds [as solicitors] for Somerville and White, or, in other words, that Somerville and White as trustees of the term had possession of the deeds; but they seem to have been aware, that they, as trustees of the term, had not a right to part with the deeds even to the mortgagees who advanced the money, and it was therefore announced very early that the deeds would

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not be parted with; and this proper resolution was adhered to after a requisition for them had been made by the solicitor of the mortgagees. Messrs. White & Carew appear to me to have been well aware of their duty to the infant tenant in tail, for whom or for whose next friend they were acting as solicitors; and they seem likewise to have contemplated the time when it would be their duty to deliver up the deeds to him." Accordingly, Somerville and White, by a deed of even date with their mortgage, reciting that *they* were in possession of the deeds, entered into a covenant to produce them to the mortgagees, and not to part with them to any other person, unless such person should enter into a covenant for their production to the satisfaction of the mortgagees, or unless or until the trustees should have given two months' notice of their intention to deliver them up. The Master of the Rolls, considering this part of the transaction as beneficial to the infant tenant in tail, was of opinion, that, whoever might have been previously entitled to hold the deeds, the trustees, after incurring this responsibility for the benefit of all parties, were entitled to hold them until they were relieved from their covenant, and that White & Carew held the deeds as the solicitors of the trustees. Subsequently the firm of White & Carew was enlarged into that of White, Carew, & White, and soon after Carew retired, and it was agreed that the deeds relating to any business in which the elder White was a trustee should remain with Messrs. White. Carew, being employed as the solicitor for the next friend of the tenant in tail, demanded the deeds from White, who objected, on the ground of his covenant, to deliver them, but took no steps to relieve himself from that covenant. It was ordered, on the petition of the tenant in tail, that the deeds be delivered up to the tenant in tail or his agent, on a proper covenant for their production to the mortgagees being given. No costs were given against the trustees. If they had not improperly raised difficulties, they would have been entitled to their costs. See *Harper* v. *Faulder*, 4 Mad. 129; ante, Vol. 5, p. 479.]

[In *Wiseman* v. *Westland*, 1 You. & J. 117, it was held that a mortgagee for years, who had not taken a grant of the deeds, was not entitled to an order for the delivery of them, even upon a decree for foreclosure. The freeholder is entitled to retain them to avail himself of a forfeiture by the termor. As the deeds were in the hands of an equitable mortgagee without notice, it was not necessary to determine the point. But where the owner has merely an estate for years, his assignee, whether by way of purchase or of mortgage, is both at law and in equity entitled to the deeds; *Hooper* v. *Ramsbottom*, 6 Taunt. 12; except, in equity, against a subsequent depository without notice; and in Ireland it was held that he was so entitled to a renewed lease or graft subsequently obtained by the mortgagor. *Smith* v. *Chichester*, 2 Dru. & W. 393.]

[In *Hallett* v. *Middleton*, 1 Russ. 243, an estate was conveyed as a security to trustees, in trust to sell, if the unsatisfied debts of a firm, in which the owner had been partner, should at any time exceed 40,000*l*. A purchaser from the trustees having taken a conveyance, reciting that the debts exceeded that amount, that the owner had died intestate, and con-

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taining covenants by his heir, extending to the acts of his ancestor, for title and for further assurance; it was held that he was not entitled to have the books and documents relating to the partnership accounts delivered to him, or deposited for safe custody, or to a covenant by the heir for their production. Lord *Gifford*, M. R., said—"How are these documents connected with the title? The estate belonged to M., but these documents did not belong to him. These books and writings may afford evidence of a collateral fact, but cannot be considered as connected exclusively or directly with the title to the lands. Is every scrap of paper which may shew the truth of any of the recitals in a conveyance to be deemed a document of the title? I find no case, in which a purchaser, after taking a conveyance from an heir-at-law by deeds which set forth the pedigree of the vendor, has filed a bill stating that there are various books, family bibles, &c., containing entries which prove the pedigree as recited, and insisting on that ground that these books, bibles, &c., ought to be delivered up to him or secured for his use." The only documents, therefore, that can be said to be documents of title for this purpose are such as have for their principal object the creating or evidencing of some link in the title.]

Custody of deeds.

What are documents of title.

Inspection of deeds, &c., at law.

[The production of deeds at law for the benefit of one who is not entitled to the custody of them can be compelled only in aid of an action and for the purpose of such action. *Ex parte Partridge*, 1 Har. & W. 350. The foundation of the jurisdiction (which against a party is exercised by a single judge at chambers, and in the case of a stranger by the process of subpœna duces tecum, and will be enforced by attachment, *Cooke* v. *Tanswell*, 1 Moore, 465) is an express or implied obligation on the party in possession of the deed to produce it for the use of the other party. When only one part is executed, the holder of it is impliedly a trustee for the other party; and, whether plaintiff or defendant, may be ordered to produce it for his inspection. *Blogg* v. *Kent*, 4 Moo. & P. 433; *Barry* v. *Alexander*, 4 Doug. 15; *Deverner* v. *Bouverie*, 1 Moo. & Sc. 29; *Charnock* v. *Lumley*, 5 Scott, 438; *Reid* v. *Coleman*, 2 Cr. & M. 56; *Griffin* v. *Smith*, 8 D. P. C. 490. Of course the same right exists where the deed is deposited with a third person for the benefit of all parties. *Ex parte Bretton*, 1 Har. & W. 212; *Jessel* v. *Millengen*, 1 Moo. & Sc. 605; *Browning* v. *Aylwin*, 7 B. & Cr. 204. In *Blakey* v. *Porter*, 1 Taunt. 386, an action on a covenant, the defendant, who held the only part of the deed containing the covenant, was ordered to permit the plaintiff to read and take a copy of it; and a similar rule was made absolute in *King* v. *King*, 4 Taunt. 666, notwithstanding an affidavit, on the part of the defendant, that the plaintiff had given out that he intended to take advantage of a defect in the lease if he could procure an inspection. "It must be understood," said *Mansfield*, J., "that when one part only is executed of a deed the party who holds it is trustee for the other." The jurisdiction, being founded on an undertaking implied from the execution of one part only and the entrusting of it to one of the parties, does not arise when there were originally two parts and one of them has been lost. *Street* v. *Brown*, 6 Taunt. 304; *Lord Portmore* v. *Goring*, 12 Moore, 363; *Woodcock* v. *Worthington*, 2

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Production for the purpose of stamping.

You. & J. 4. See *Mayor of Arundel* v. *Holmes*, 2 You. & J. 118, where, an indorsement having been made on a lease, varying the terms, the lessor was held entitled to inspection notwithstanding the execution of a counterpart. But if the remaining part is unstamped the Court will enforce its production for the purpose of stamping merely, in order that secondary evidence may not be excluded at the trial by the production of the unstamped part. *Bousfield* v. *Godfrey*, 2 Moo. & P. 771; *Neale* v. *Swind*, 2 Cr. & J. 278; *Travis* v. *Collins*, Id. 625. See *Clements* v. *May*, 7 Car. & P. 678. But this will not be done at the instance of a stranger to the instrument. *Lawrence* v. *Hooker*, 2 Moo. & P. 9. In *Bateman* v. *Phillips*, 4 Taunt. 161, the Court ordered the defendant to produce an instrument in his custody for the purpose of stamping it, the plaintiffs by their declaration claiming to be parties in interest, though not named as such. As to producing and stamping a copy when the defendant surreptitiously obtains possession of and destroys the unstamped original, see *Bousfield* v. *Godfrey*, 2 Moo. & P. 771.]

What interest sufficient to entitle a party to inspection at law.

[In *Bateman* v. *Phillips*, *Heath*, J., observed, that the rule restraining the production of instruments to the application of a party named therein was much too strict; for suppose a person, though no party to a deed, took an estate by way of remainder, he had nevertheless a strong interest in the deed, and was entitled to compel the production. In the case of a copyholder, it was sufficient to enable him to obtain an inspection of the court-rolls that he claimed an interest in them: it was not necessary to shew by affidavit that he had an interest. In *Ratcliffe* v. *Bleasby*, 10 Moore, 523, the plaintiff and defendant being about to enter into partnership, a draft-agreement was prepared by the defendant's attorney, and approved by the plaintiff's; and the engrossment was executed by the defendant only. It was held that the plaintiff had an interest sufficient to entitle him to inspect and copy the draft, but not the deed. See *ex parte Bretton*, 1 Har. & W. 212. It would have been otherwise if the *plaintiff* had been the only executing party. *Morrow* v. *Saunders*, 3 Moore, 671. See *Jessel* v. *Millengen*, 1 M. & Sc. 605; *Woolner* v. *Devereux*, 3 Scott & R. 224. And as to the question of interest, see *Brown* v. *Rose*, 6 Taunt. 283; *Taylor* v. *Osborne*, 4 Id. 149; *Rundle* v. *Beaumont*, 1 Moo. & P. 396; *Rowe* v. *Harden*, Id. 334; *Rex* v. *Winkles*, M'Clel. & Y. 33. In *Smith* v. *Winter*, 3 Mee. & W. 309, the defendant in an action on bills of exchange, having pleaded that he was liable, if at all, only as surety, was held not entitled to inspection of a deed in the plaintiff's possession by which, it was suggested, time had been given to the principal debtor.]

Stranger having deed obliged to produce it.

[A stranger to the action, who has obtained possession of the only part of a deed from one of the parties who has executed it, will be compelled to produce it for the benefit of any other party, for in such case the deed carries on the face of it notice of the implied trust on the part of the holder. *Doe* d. *Morris* v. *Roe*, 1 Mee. & W. 207, where the mortgagee of a lease, which had been executed by the lessee, was ruled to produce the deed in an action of ejectment by the lessor for a forfeiture. This case seems to overrule the decision at Nisi Prius in *Schlencker* v. *Moxey*, 1 Car. & P. 178, 5 D. & Ry. 747. But where the plaintiffs claimed as devisees, and the defendant had executed a mortgage of the premises to

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B. and given him the *will*, it was held that the latter was not bound to produce the will, and that secondary evidence was not admissible. *Doe* d. *Bowdler* v. *Owen*, 8 Car. & P. 110; see *Doe* d. *Carter* v. *James*, 2 Moo. & R. 47. Of course the solicitor or agent for a party (as an auctioneer) may be ordered to produce a document which would have been liable to production in the hands of his employer. *Morrow* v. *Saunders*, 3 Moore, 671; *Gigner* v. *Bayly*, 5 Id. 71. Where the document is in the hands of an attorney in that character, or where the party applying is an instrumentary party to the document, the Court will interfere in a summary way upon motion; but where the applicant only claims as a party in interest, it seems that a stranger to the action, not being an attorney, can only be acted upon by the process of subpœna, and will have an opportunity at the trial to make his objections. *Cocks* v. *Nash*, 3 Moo. & Sc. 164. Where the plaintiff, who was the assignee of A., a bankrupt, sued B. in respect of contracts alleged to have been entered into with the plaintiff by A. on the joint account of A. & B., B. was held entitled to an inspection of the books of A. in the possession of the plaintiff, as his assignee. *Whitbourne* v. *Pettifer*, 1 Moo. & Sc. 182. A third person in possession, not as agent for a party to the suit, and who has not gained the possession under any express or implied trust for the applicant, will not be ordered to allow inspection, whether he hold the document for his own benefit or for that of another. Thus the defendant in an action of trespass brought to try the title to land was not allowed to call upon the plaintiff (who claimed under a lease), or upon his landlord, to produce a deed relating to the title of his landlord. Per Cur.—"Is there any case where a deed has been ordered to be produced, unless it has been deposited in the hands of the holder as a trustee for others only, or for others jointly with himself? We might work great injustice by granting this application. Parties are never compelled to produce their title-deeds. If a subpœna duces tecum is served, the party must bring his deeds into Court in obedience to the subpœna; but if he states that they are his title-deeds, no judge will ever compel him to produce them." *Pickering* v. *Moyes*, 1 B. & Cr. 262; see *Field* v. *Beaumont*, 1 Swanst. 289; *Doe* d. *Wyndham* v. *Date*, 6 Jur. 990; *Harris* v. *Hill*, 3 Stark. 140; *Miles* v. *Dawson*, 1 Esp. 405; Peake, Add. Cas. 54.]

Inspection of deeds, &c., in equity.

[There is much more uncertainty as to the grounds upon which a bill in equity, seeking inspection of documents by way of substantive relief and not of discovery merely, can be sustained. It has been assumed, (see Sugd. Vend. 117), but never decided, that where deeds relate to several properties, and the owner of one of the estates has entered into a covenant to produce them, the obligation of this covenant will run with the land, or rather with the deeds, in equity, whatever may be the fate of the legal remedy. It has been generally supposed that this doctrine is inconsistent with what fell from Sir *J. Leach*, in the much-canvassed case of *Barclay* v. *Raine*, 1 Sim. & Stu. 449; but the point did not then arise, and the expressions used by the learned judge, even if correctly reported, are so ambiguous, and the suggested conclusion from them is so inconsistent with his remarks in a subsequent case, that much importance cannot be attached to them.] The point actually decided in that case was, that, even where it is clear that the equitable right to call

Barclay v. *Raine.*

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for production of deeds exists, a purchaser is not compellable to rely upon it, but is entitled to a covenant for the production of all deeds material to the title, which are not placed in his possession; and the circumstance, that he cannot have either the deeds or such a covenant, affords a sufficient ground for resisting the performance of the contract. It appeared that the property in question was held under the same title as certain hereditaments which had been formerly sold to a Mr. John Thring, about the same time that the property in question was sold to Mr. George Barclay, under whom the plaintiffs derived their title; upon the sale to Thring, the title deeds to the premises purchased by him, which also related to the premises purchased by Barclay, were delivered to him, and he executed a deed of covenant to the then vendors, dated 12th July, 1797, to produce them, in the usual manner; an attested copy of this deed of covenant was delivered to Mr. George Barclay by his vendors, and was, at the time when the Master made his report, in the possession of the plaintiffs. This attested copy was produced before the Master, who found that a considerable part of it was destroyed, and that the names of the attesting witnesses were decayed, torn, or obliterated. No deed of covenant was given to Mr. Barclay for the production of the title-deeds. The original deed of covenant had since been lost; inquiries had been made for it, but without effect, and no hopes were entertained that it would be found. John Thring sold his part of the property to Mr. Slade, under whom Messrs. James and John Slade, the present proprietors of it, claimed to be entitled. Application had been made by the plaintiffs to Messrs. James and John Slade for a new deed of covenant to produce the title-deeds; but they refused to give it. It appeared, that, upon the sale by Thring to Slade, part of the purchase-money remained on mortgage, and the title-deeds were, therefore, left with Thring, in whose hands they still remained. The plaintiffs applied to Mr. Thring for a covenant to produce, and he accordingly executed a deed of covenant, dated the 29th of October, 1822, by which he covenanted with the defendant Raine to produce the deeds, *whilst he should continue mortgagee.* Raine objected to this deed as insufficient, and therefore Thring executed another dated the 18th of January, 1823, by which he acknowledged the execution by him of the original deed of covenant of the 12th of July, 1797; and also, that the several title-deeds mentioned in the schedule to the original deed of covenant were, at the date of this last deed, in his possession. Copies of these two deeds of covenant, of the 29th of October, 1822, and the 18th of January, 1823, were delivered to the defendant's solicitor before the filing of the bill. The defendant, when he agreed to purchase, had no notice that the plaintiffs could not deliver the original title-deeds to him. Under these circumstances, the Master stated his opinion to be, that the plaintiffs ought to procure a deed of covenant from Messrs. James and John Slade, for the production of the title-deeds. The question was afterwards brought before the Court. Sir *J. Leach*, V. C.—"A court of equity never compels a purchaser to take without the title-deeds, unless he has a covenant to produce them; *and a right in equity to compel the production of the deeds, even if it existed, would be no answer.* But the equity of the purchaser, in the present case, would be highly questionable. Thring's covenant to produce

Purchaser not bound to rely on such right, if it exists.

Purchaser entitled to a covenant for the production of title-deeds.

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does not run with the land* ; nor is it pretended that Slade had notice of that covenant; and Slade, like every other proprietor, has a material interest against the exposure of his title-deeds."

On what ground his Honor thought that the right to enforce the production of the title-deeds had been excluded in this case, does not distinctly appear. That he did not intend to deny the existence in general of such an equitable right, is evident from his observations in the subsequent case of *Fain* v. *Ayers*, 2 Sim. & Stu. 533; the circumstances of which were briefly as follow:—

Fain v. *Ayers.*

In 1818, B., the defendant, sold and conveyed a piece of ground to A., he (B.) retaining the title-deeds, but not covenanting to produce them; this conveyance, however, contained the usual covenant for further assurances. A. had since sold the ground, and being unable, as he alleged, to make a marketable title, for want of a covenant for the production of the deeds, he filed a bill against B., praying that he might be compelled to produce, or to execute a covenant to produce them, the plaintiff offering to pay all reasonable charges. The defendant put in a general demurrer. It was insisted for the plaintiff, that, under the covenant for further assurance, the plaintiff had a right to call upon the defendant to execute a covenant to produce title-deeds, as being a further assurance.

Whether vendor, under his covenant for further assurance, is bound to execute a covenant to produce title-deeds.

The Vice-Chancellor seemed inclined to think that the case made by the bill was not sufficient, but ordered the demurrer to stand for judgment. But, on a subsequent day, his Honor said, "I do not think that there has been a judicial decision upon the particular point, whether, under a covenant for further assurance in a conveyance, a new deed of covenant to produce title-deeds may be required. But, whatever doubt there may be upon that point, this bill, stating that the plaintiff has re-sold the property, prays alternatively, either a new deed of covenant to produce, or the actual production of the title-deeds, to enable the plaintiff to shew a marketable title upon his re-sale. The defendant's title-deeds being the root of the plaintiff's title, and, in that sense, a sort of common property, *I strongly incline to think that the plaintiff has an equity to that extent;* and I am informed, that the Lord Chancellor has expressed an opinion to that effect."

It was not attempted to be maintained, in this case, that, independently of contract, a party interested in the deeds (whatever right he might have to enforce their production) could call upon the person having the deeds to enter into a covenant for their production.

Noel v. *Ward.*

Production for benefit of contingent remainderman's mortgagee refused.

[In *Noel* v. *Ward*, 1 Madd. 322, the mortgagee of a contingent remainderman in fee was not allowed to have an inspection of the deeds in the hands of the tenant for life, in order to enable him to make a sale. Sir *T. Plumer*, V. C., said, "This application is not against a mere tenant for life, but against a person having a present and also a contingent estate

* His Honor, on a subsequent occasion, denied his having used the expression here imputed to him. He did not say that Thring's *first* covenant did not run with the land, (for his Honor thought that it clearly did), but that the *second* covenant was restricted to the period of his being mortgagee. Rolls, 28th July, 1830.

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of inheritance. No authority has been produced, though much search appears to have been made, where a person having a *contingent* remainder has been permitted to call upon the tenant for life for an inspection of title-deeds. In all the cases cited there were *vested* remainders. The bill is filed by a stranger, stating himself to be a purchaser of Sir C. B.'s contingent interest, Sir C. himself being out of the jurisdiction, and no party to the suit. Permitting such a bill might lead to great inconvenience." In the subsequent case of *Shaw* v. *Shaw*, 12 Price, 163, the application of a vested remainderman, who wished to mortgage his interest, for liberty to inspect the title-deeds was refused. *Graham*, B., said, "Title-deeds are, in all cases, primâ facie property in the custody of the tenant for life. In many cases, as in *Lady Shaftesbury* v. *Arrowsmith*, 4 Ves. 71, a party claiming a remote interest has a right to inspect such deeds; but where a bill is filed for a discovery*, it is not competent for the plaintiff to call for all a defendant's deeds for indiscriminate use, or the title of every man might thus be subjected to exposure, and be at the mercy of every inquisitive person who might choose to avail himself of the opportunity of examining them through the medium of a remainderman. In every case of production of deeds some particular specific deed should be pointed out and expressly called for, and not all indiscriminately; and the object of the party applying to have them produced should be fully and clearly stated." See *Ivie* v. *Ivie*, 1 Atk. 429; *Smith* v. *Cooke*, Id. 382; *Pyncent* v. *Pyncent*, 3 Id. 571. In *Lord Lempster* v. *Earl Pomfret*, Dick. 238, the bill was for discovery of title-deeds, and for an injunction to stay waste, the plaintiff charging that the defendant, his father, was tenant for life only, subject to waste, with remainder to him in tail. The defendant, swearing that he was dispunishable for waste, was protected from the discovery. Lord *Hardwicke*, C., said, "A plaintiff is entitled to come for a discovery of deeds or facts where he wants them as auxiliary to relief or for remedy at law, but not without any occasion for such relief or remedy. If there be deeds relative to an estate touching which no relief or remedy is wanted, yet, if the party have occasion to mortgage, he may be entitled to a discovery. So, as between father and son, if a reasonable proposal of marriage were made to the son, and the father refused to discover deeds, a court of equity might grant a discovery." See Hare on Discovery, 1839. Where a tenant for life delayed to produce the deeds before the Master, in aid of a sale of a prior term to raise portions, an order was made, on motion, for a receiver of the rents and profits. *Brigstocke* v. *Mansel*, 3 Madd. 47.]

Inspection of deeds in equity.

Vested remainderman.

Shaw v. *Shaw.*

Lord Lempster v. *Earl Pomfret.*

[Whatever may be the rights of a remainderman in respect of the deeds, it is clear that a part owner in possession may oblige the owner of any other part of the lands, who has the deeds, to produce them. See *Shore* v. *Collett*, G. Coop. 234, ante, p. 7; *Hercy* v. *Ferrers*, 4 Beav. 97; *Combe* v. *City of London*, 4 You. & C. 155; 1 You. & C. C. C. 631; *Wilson* v. *Forster*, M'Clel. & Y. 274; *Brigstocke* v. *Mansel*, 3 Madd. 47; *Fain* v. *Ayers*, 2 Sim. & Stu. 533, ante, p. 93. But where a tenant in common had sold his share, and taken a conveyance back by way of

Part owner in possession.

* [This is an inaccuracy; the bill was not for discovery, but for *relief*, viz., the inspection of the deeds.]

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mortgage, Lord *Eldon* held, that he was protected from producing the deeds to enable the owner of the other share to sell, on the ground that a mortgagee has no right to shew his mortgagor's title. *Lambert* v. *Rogers*, 2 Meriv. 487. In *Grane* v. *Cooper*, Wigram on Discov. 246, the plaintiff filed his bill against his two copartners. The three had mortgaged joint property of the partnership, and some documents relating to that mortgage were held by one of the defendants as solicitor for the mortgagee. The Lord Chancellor refused to make an order for their production in the absence of the mortgagee*. See *Hercy* v. *Ferrers*, 4 Beav. 97. The practice is different upon a bill for discovery merely; for there, as no person can be made a party to the suit who is not a party to the action at law, the defendant is precluded from objecting that his mortgagor is absent. *Balls* v. *Margrave*, 3 Beav. 448; 4 Id. 119.]

Discovery.

[Where the plaintiff seeks an inspection of writings by way of discovery and not as the ultimate relief, he must also, in most cases, shew some interest in them,—that they will, in some way, help to make out his title; and he cannot claim to see them where they only give an adverse title to the defendant. See *Smith* v. *Duke of Beaufort*, 1 Hare, 507; S. C. on appeal, 7 Jur. 1095; *Hardman* v. *Ellames*, 2 Myl. & K. 745; *Att.-Gen.* v. *Ellison*, 4 Sim. 240; *Inman* v. *Hodgson*, 1 You. & J. 28; *Freeman* v. *Fairlie*, 3 Meriv. 43; *Cock* v. *St. Bartholomew's Hospital*, 3 Ves. 138.]

Heir in tail.

[Where the plaintiff claimed under a settlement and the defendant under recoveries, Lord *Thurlow* refused to order the latter to produce deeds, saying that he thought the principle was, that plaintiffs could only call for those papers in which they had shewn that they had a common interest with the defendant, and courts had never gone beyond that. In *The Earl of Suffolk* v. *Howard*, 2 P. Wms. 177, an heir in tail, whose estate had been barred by his father, was, on the ground of the favour shewn to heirs special, held entitled to a discovery of the deeds under which the defendant claimed; and a similar order was made under like circumstances in *Battison* v. *Farrington*, 2 P. Wms. 179, n.; 3 Id. 363. So in *Lady Shaftesbury* v. *Arrowsmith*, 4 Ves. 66; see 6 Ves. 296: *Leman* v. *Alie*, Ambl. 163; *Stapleton* v. *Sherrard*, 1 Vern. 212; *Sherborne* v. *Clerk*, Id. 273; *Kelley* v. *Berry*, 2 Id. 35; *Lord Mountnorris* v. *Dungannon*, 2 Molloy, 317.]

Purchaser for value without notice.

[In *Strode* v. *Blackburne*, 3 Ves. 222, Lord *Rosslyn* held, that a mortgagee who had innocently taken his mortgage from a tenant for life for a period beyond his life, must, at the suit of the remainderman, make discovery of the deeds in his possession. This doctrine was overruled in *Wallwyn* v. *Lee*, 9 Ves. 24, by Lord *Eldon;* where, upon a bill by te-

Wallwyn v. *Lee.*

* [As to the mortgagee's privilege against discovery of his deeds, vide ante, Vol. 1, p. 100; *Anon.*, Mosel. 246; *Sparke* v. *Montriou*, 1 You. & C. 103; *Addison* v. *Walker*, 4 You. & C. 447; *Lloyd* v. *Wait*, 12 Sim. 103; *Brown* v. *Lockhart*, 10 Id. 420; *Phillips* v. *Evans*, 2 You. & C. C. C. 647. As to jointresses, see *Senhouse* v. *Earl*, 2 Ves. sen. 450; *Leech* v. *Trollop*, Id. 666; *Chamberlain* v. *Knapp*, 1 Atk. 52; *Petre* v. *Petre*, 3 Id. 511.]

12. APPOINTMENT AND RELEASE IN FEE.

Discovery of deeds in equity.

nant in tail in possession for discovery and delivery of title-deeds, allowed a plea of a mortgage to the defendant by the tenant for life, alleging himself to be tenant in fee, and being in possession of the estate and deeds as apparent owner. "This bill is filed by a person having got possession. If the principle is, that this Court will not stir against a purchaser for valuable consideration without notice, what are the legal rights of the son, tenant in tail, when his father's life estate determines? His legal rights are, that he shall have possession of the estates; I do not know that I am entitled to say, of the title-deeds, but that he shall recover in trover the value of the deeds, or in detinue, in which the judgment is for the deeds or the value. But, without attending to the imperfection of the law in such actions, which is probably the ground of the jurisdiction here for the specific delivery of the thing, I will suppose his right at law to be the specific delivery. It is true, he is not seeking in equity to recover possession of the estate; but he is seeking to recover something which he cannot recover at law, the value of which non constat he can recover at law without the discovery of the deeds. Is it of necessity, then, that this Court must hold, as against a purchaser for valuable consideration without notice, that, if the possession of the estate has been got from him, the possession of the deeds shall be taken out of his hands by this Court, and thrown in to the person who has got from him the possession of the estate? Is it not worth consideration, whether the very principle of this plea is not this—'I have honestly and bonâ fide paid for this, in order to make myself the owner of it, and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself in the article of purchasing bonâ fide?' Is it not worth consideration, whether every plea of purchase for valuable consideration without notice does not admit that the defendant has no title? If he has a good title, why not discover? I apprehend there is sufficient ground for saying, a man who has honestly dealt for valuable consideration without notice shall not be called upon, by confessions wrung from his conscience, to say he has missed his object in the extent in which he meant to acquire it. I doubt, therefore, the argument calling upon the Court to presume that this man can bring no ejectment; that, if he did, he could not recover; that he has not now the legal fee; that he has not some term vested in him; that he may not be able to procure either; and presuming that, at the hazard of preventing him from doing that very thing if he is at this moment engaged in the endeavour to do it." Of course, the purchase deed upon which the plea is founded, or its material contents, must be stated. See Hare on Discov. 95; ante, Vol. 5, p. 480. Where the Court sees reason to suspect, from any circumstance, as from the recitals of a deed set forth in the answer, that the defendant, a purchaser for valuable consideration, must have had notice, he will be ordered to produce that deed. *Kennedy* v. *Green*, 6 Sim. 6; ante, Vol. 5, p. 490: *Neesom* v. *Clarkson*, C. P. Coop. 93; 2 Hare, 163. See *Tyler* v. *Drayton*, 2 Sim. & Stu. 309; *Hardman* v. *Ellames*, 2 Myl. & K. 732; *Phillips* v. *Evans*, 2 You. & C. C. C. 647.

13. ASSIGNMENT OF TERM TO ATTEND THE INHERITANCE.

13. ASSIGNMENT *of a* TERM *of* YEARS IN TRUST *to* ATTEND *the* INHERITANCE. (*Intended to accompany the last Precedent*).

Parties.

THIS INDENTURE, made the —— day of ——, in the year ——, BETWEEN [*vendor's trustee*], of &c., of the first part; [*vendor*], of &c., of the second part; [*purchaser*], of &c., of the third part; and [*purchaser's trustee*], of &c., of the fourth part; WHEREAS, by an indenture, bearing date on or about the —— day of ——, 18—, and made between [A.], of the one part, and [B.], of the other part; the said [A.], for the considerations therein mentioned, granted and demised unto the said [B.], his executors, administrators, and assigns (*a*), *All and singular the hereditaments hereinafter described and expressed to be hereby assigned; To hold* the same unto the said [B.], his executors, administrators, and assigns, for the term of 1000 years thence next ensuing, by way of mortgage, for securing the payment of the principal sum of £—— and interest (*b*): AND WHEREAS, by divers mesne assignments, and other assurances or means effectual in the law, and ultimately by an indenture, bearing date on or about the —— day of ——, and made between [C.], of the first part; [D.], of the second part; the said [*vendor*], of the third part; and the said [*vendor's trustee*], of the fourth part; All and

Recital of deed creating the term;

—of last assignment of the term;

(*a*) If only part of the premises included in the term is to be assigned, say—

"(Among other hereditaments").

(*b*) Sometimes, instead of reciting the deed creating the term, it is only incidentally noticed in the recital of the last assignment, thus—

Short notice of the creation of the term.

"AND WHEREAS, by an indenture of assignment made the —— day of ——, &c., the residue of a certain satisfied term of —— years, created by an indenture of demise or mortgage, bearing date on or about the —— day of ——, of and in ALL THAT (*describing parcels*), was assigned unto the said [*trustee*], his executors," &c.

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singular the hereditaments and premises comprised in and demised by the hereinbefore-recited indenture of demise or mortgage were assigned unto the said [*vendor's trustee*], his executors, administrators, and assigns, for the residue of the said term of 1000 years, in trust to attend the inheritance, for the said [*vendor*], his appointees, heirs, and assigns, (*c*) (*d*): AND WHEREAS the said [*vendor*] lately contracted and agreed with the said [*purchaser*] for the absolute sale to him of the inheritance in fee-simple in possession of and in (*e*) the hereditaments and premises comprised in the said term of 1000 years, free from all incumbrances, at the price of £——; and, accordingly, by (*f*) an indenture of appointment and release, bearing even date with, and executed immediately before the execution of these presents, and made between the said [*vendor*], of the first part; [*vendor's dower-trustee*], of the second part; the said [*purchaser*], of the third part; and [*purchaser's dower-trustee*], of the fourth part; the said

—of contract for sale and contemporaneous conveyance of the fee.

(*c*) The title to the fee-simple, if it has undergone any change since the last assignment of the term, should be shortly recited.

(*d*) Where the trustee has died intestate, and limited administration has been taken out for the purpose of assigning the term, the following recital may be added :—

"AND WHEREAS the said [*trustee*] having departed this life without making any assignment of the hereditaments and premises included in the said term of —— years, and having died intestate as to the same, letters of administration limited to the said [*trustee's*] right, estate, and interest in the said term were lately granted to the said [*administrator*] by the Prerogative Court of the Archbishop of Canterbury, in order to enable the said [*administrator*], as the special representative of the said [*trustee*], deceased, to assign the legal estate and interest in the said hereditaments included in the said term of —— years so vested in the said [*trustee*], deceased, as aforesaid.

Recital of limited administration.

(*e*) If the contract includes part only of the premises affected by the term, say—

"part of" &c., "being the hereditaments hereinafter described."

(*f*) [If a lease for a year was executed, the recital will run thus :—

"By indentures of lease and appointment and release, the indenture of lease bearing date the day next before the day

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hereditaments and premises (*g*), by the description of (*describe parcels as in the conveyance*), with their appurtenances, have, in consideration of the said sum of £—— paid by the said [*purchaser*] to the said [*vendor*], been conveyed and assured (*h*), *To such uses*, for such estate or estates, in such proportions, and for such intents and purposes, as the said [*purchaser*] by any deed or deeds shall direct or appoint; And, in default of such direction or appointment, *To the use* of the said [*purchaser*] and his assigns, during his life, without impeachment of waste; with remainder *To the use* of the said [*purchaser's dower-trustee*], his executors and administrators, during the life of the said [*purchaser*], *In trust* for him and his assigns, with remainder *To the use* of the said [*purchaser*], his heirs and assigns, for ever: AND WHEREAS the said [*purchaser*] is desirous that the residue of the said term of 1000 years (*i*) should be assigned to the said [*purchaser's trustee*], his executors, administrators, and assigns, in trust for the said [*purchaser*], his appointees, heirs, and assigns, and to attend the inheritance, according to the uses of the said indenture of appointment and release of even date herewith: NOW THIS INDENTURE WITNESSETH, that, for the considerations aforesaid, and also in consideration of the sum of 10*s.* of lawful British money paid by the said [*purchaser's trustee*] to the said [*vendor's trustee*] immediately before the execution of these presents, the receipt whereof is hereby acknowledged, the said [*vendor's trustee*], by the direction and appointment of the said [*vendor*], and on the nomination of the said [*purchaser*], testified by their respective execution hereof, *Doth*, by these presents, bargain, sell, assign, and transfer unto the said [*purchaser's*

Testatum.

Vendor's trus-

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of the date of these presents, and the indenture of appointment and release bearing even date with" &c.]

(*g*) If part only—

"so purchased by the said [*purchaser*] as aforesaid."

(*h*) Some persons refer to the uses in more general terms, thus:—

"To uses for the benefit of the said [*purchaser*], his appointees, heirs, and assigns."

Variation where assignment is of part only.

(*i*) If part only, say—

"so far as the same relates to the said hereditaments and premises so purchased by him as aforesaid."

trustee], his executors, administrators, and assigns (*k*), ALL THAT AND THOSE the said [*words descriptive of the subject-matter of the conveyance*], and hereditaments hereinbefore described, and all and singular other the premises comprised in, and demised by, the hereinbefore recited indenture of demise and mortgage, of the —— day of ——, 18—, and also expressed to be appointed and conveyed by the said indenture of appointment and release of even date herewith, and all the rights, members, and appurtenances thereunto belonging or appertaining; *And also* all the estate, right, title, interest, claim, and demand whatsoever, both at law and in equity, of the said [*vendor's trustee*] (*l*) in, to, or upon the same premises, or any part thereof: TO HAVE AND TO HOLD the said ——, and all and singular other the premises intended to be hereby assigned, with their appurtenances, unto the said [*purchaser's trustee*], his executors, administrators, and assigns, henceforth during all the residue or remainder now unexpired of the said term of 1000 years, and for all other the estate, term, and interest (if any) of the said [*vendor's trustee*]

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tee, by the direction of vendor, and on the nomination of purchaser, assigns to purchaser's trustee —the premises.

Habendum.

(*k*) If part only, say—

"*All* so much and such part or parts of the said messuage, &c. comprised in and demised by the hereinbefore-recited indenture of demise or mortgage, of the —— day of ——, 18—, as are comprised in or expressed to be assured by the said indenture of appointment and release, of even date herewith."

Variation where assignment is of part only.

(*l*) Although it is usual in practice to join the vendors in the assignment of the term as directing parties, and the above precedent has been framed in conformity to such practice, yet its propriety may be questioned, as the persons so joining have previously parted with all their interest by the conveyance, the execution of which, let it be remembered, is recited as an antecedent transaction. The practice in question regards the whole as one contemporaneous transaction. The production of such conveyance would, it is conceived, be a sufficient authority to the trustee to assign the term to the purchaser's nominee. Where the persons beneficially interested in the inheritance are numerous, the point is of some importance, as the obtaining of their concurrence in the assignment occasions much additional expense to the vendee, especially where any of such persons are married women, whose acknowledgment must be taken. The trustee, if he yields to this suggestion, sometimes requires to be furnished with an attested copy of the conveyance, but he cannot be entitled to it except upon grounds which would warrant the extension of the requisition to all the conveyances occurring since the assignment which vested the term in him.

As to joining the vendors in the assignment.

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In trust for purchaser, and to attend the inheritance.

therein; *In trust*, nevertheless, to be disposed of by the said [*purchaser's trustee*], his executors or administrators, as the said [*purchaser*], his appointees, heirs, or assigns, shall, from time to time, direct and appoint; and, in the mean time, to attend, wait upon, and be subservient to the freehold and inheritance of the same premises, according to the uses limited thereof by the said indenture of appointment and release of even date herewith, in order to protect the same from all mesne charges and incumbrances, if any such there be; And upon or for no other trust, intent, or purpose whatsoever. AND the said [*vendor's trustee*], for himself, his executors, and administrators, doth hereby covenant and declare with and to the said [*purchaser's trustee*], his executors, administrators, and assigns, that he the said [*vendor's trustee*] hath not at any time or times heretofore made, done, executed, or committed, or knowingly suffered any act, deed, matter, or thing whatsoever, whereby, or by means whereof, the said —— and premises intended to be hereby assigned, or any part thereof, are or is impeached, charged, incumbered, or in anywise affected in title, charge, estate, or otherwise howsoever. IN WITNESS &c. (*m*).

Covenant by vendor's trustee that he has not incumbered.

Assignment of terms.

As to the mode of assigning terms to attend the inheritance.

(*m*) In general it is not advisable to assign a term by the same deed as that by which the inheritance on which it is to be attendant is conveyed; because, if the deed were produced in evidence on an ejectment brought by the owner of the fee, it would negative his title to recover, by shewing the legal estate to be in another. Where, however, the termor is a mortgagee who receives part of the money advanced by the person to whom the fee is conveyed, (as in the precedent in the text), he is generally made a party for the purpose of shewing the destination of the consideration money, which of course leads to a disclosure of the term vested in him, so that the object of a separate assignment would be defeated. But even in such case the transaction is not *necessarily* disclosed on the face of the conveyance of the fee; for the consideration money may be therein treated as paid by the grantee to the grantor, and then, in the separate deed by which the term is assigned, the fact may be explained, namely, that part, or the whole, (as the case may be), of the consideration money in the contemporaneous conveyance of the inheritance expressed to be paid to the grantor was actually paid to the termor by his direction, in satisfaction of his mortgage debt. This is sometimes done, where it is deemed to be of importance that the assignment of the term should not appear on the conveyance of the fee; but, in mortgages and purchases of small amount, the additional expense consequent on assigning the term by a separate deed seems to be an objection to the plan; [and, indeed, as the demise in an ejectment may always be laid in the names of the owner of the fee and his trustee, or in the name of the trustee only, the only ground for keeping the term

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out of sight in most cases seems to be to guard against a possible slip on the part of the pleader. See *Doe* d. *Harrop* v. *Cooke*, 3 Moo. & P. 411; ante, Vol. 6, p. 471. Sometimes it is desirable to assign the term by a separate deed, on account of recitals in the former deeds relating to it, which refer to transactions that at a future period it may be expedient to keep out of sight.]

Assignment of terms.

Where both or all the terms are clearly subsisting, no useful purpose seems to be answered by keeping on foot more than one. In such cases, the younger term or terms may be properly merged in the inheritance, for the purpose of relieving the title from the complexity and expense occasioned in future alienations by the necessity of transferring a number of terms. But the expedient should not be resorted to unless it is clear that the elder term, on which reliance is placed, has not by the neglect to assign it on the occasion of some dealing with the inheritance, become extinct, according to the doctrine in *Doe* v. *Holder*, discussed ante, Vol. 6, p. 459. Among the inconveniences arising from this doctrine is the frequent necessity of keeping on foot several terms, when, if the elder term had been clearly subsisting, the more recently created terms might have been merged. The elder term may safely be merged in the younger, when there is no danger of incumbrances having been created between the periods of their respective creations. It is this possibility of the existence of early incumbrances which induces the preservation of the elder rather than the more recent term. Where several terms affecting distinct portions of the property are to be assigned, they may of course be vested in the same trustee; but, where the terms relate to the same portion of the property, they should be assigned to different trustees, in order to prevent a merger of the elder term. *Hughes* v. *Robotham*, Cro. El. 302*; *Stephens* v. *Bridges*, 6 Madd. 68. If both the terms are of considerable antiquity, this may not be a matter of much importance; but, if one be recently created, the merger is carefully to be avoided, because it would deprive the purchaser of protection against incumbrances antecedent to the creation of the younger term. If either of the terms is extinguished, (and one subsisting term is of course sufficient for every purpose), the extinguishment should be of the younger term, which accordingly may be surrendered to the person seised of the legal inheritance; but, previously to such a step being taken, it should be ascertained that grounds do not exist for presuming the surrender of the elder term, according to the modern doctrine. However numerous the terms may be, the number of the trustees never need exceed two, because, if every second term is vested in one trustee, the intervening alternate terms outstanding in the other trustee will prevent a merger. Thus, if there be four terms, respectively created in 1750, 1760, 1770, and 1780, the terms of 1750 and 1770 may be assigned to one trustee, and the terms of 1760 and 1780 to the other, and all the terms by that means will be preserved from merger. It is rarely advisable, however, to keep so many terms on foot; though, in practice, it is usual to go on assigning all that has been assigned before; and this is not unfrequently extended to terms which clearly have no existence,

Mode of preventing attendant terms from merging in each other.

As to cesser of terms.

* As to the merger of terms, see the chapter on merger, ante, Vol. 8; 3 Sugd. Vend. 10th ed. 19; and 3 Prest. Conv. passim.

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Assignment of terms.

Cesser and revival of terms.

having been made determinable upon an event which has happened. See *Hays* v. *Bailey*, 3 Sugd. Vend. 4. But before we come to the conclusion, that cesser has taken place, it should be seen that nothing has been done to render the term, though originally defeasible, absolute, which effect, it should seem, would be produced by the owner of the inheritance joining in the assignment of it as an absolute instrument, not merely as a directing but as a *confirming* party. [See *Denn* d. *Wilkins* v. *Kemeys*, 9 East, 371, 375. In *Doe* d. *Rogers* v. *Brooks*, 3 Ad. & E. 516, by a mortgage deed, reciting a prior mortgage by A. for 1000 years to C. and H., C. and H. assigned, and A. granted, demised, bargained, sold, ratified, and confirmed, the land to the plaintiff for the residue of the said term. It was held that proof of the prior mortgage was not requisite to support the plaintiff's title; either C. and H. had power to assign, or A. created a term of the stated duration.] The utility of attendant terms of years, as a protection against judgments, antecedent mortgages, dower, &c., has already been incidentally discussed. Vide ante, Vol. 1, p. 503, Vol. 5, pp. 39, 44, 48, 64 b, n., 71, 445, 487. The doctrine has been the subject of much learned research and discussion among text writers. Vide Harg. & Butl. Co. Litt. 208. n., 290. b., n.; 3 Sugd. Vend. & Purch., 10th ed., 1 et seq.; 2 Prest. Ab. 16; 3 Id. 277; Cov. Pow. Mortg. 477, n.; Patch on Mortg. 299, 377.

Cases in which terms should be assigned.

Mr. Butler has propounded the following general rules, as explanatory of the cases in which purchasers and mortgagees should require an assignment of outstanding terms.

1st. "That wherever a term has been raised for securing the payment of money, as the assignment of it by the trustee for the person entitled to receive to a trustee for the person obliged to pay the money, is the best possible evidence of the payment of the money, it may be reasonably required as such."

2nd. "In case a term for years has been assigned to attend the inheritance, if, upon a purchase, all the deeds (as well originals as counterparts) by which the term was created or assigned are delivered to the purchaser, and he is *satisfied that the trustee in whom it is there said to be vested has made no prior assignment of it, and that the vendor has not charged the estate with any intermediate incumbrance*, it is difficult to say what possible use can be made of the term against him, or what good can be answered by requiring an assignment of it to a trustee of his own, unless it be to satisfy the requisitions of those to whom he may afterwards have occasion to mortgage or sell the estate."

3rd. "But if any of the deeds respecting the term are not delivered to the purchaser, *or if he is not satisfied of the trustee not having previously assigned it*, or of the vendor having made no intermediate incumbrance, it seems prudent to require an actual assignment of it to a trustee for him." Co. Litt. 290.

These rules have been mentioned with approbation, and transcribed by Sir E. B. Sugden, in his excellent Treatise on Vendors and Purchasers, Vol. 3, p. 10, but there is an inaccuracy in them, which seems to have escaped notice. It will be observed, that an assignment of a term is recommended to be taken where the purchaser "is not satisfied of the trustee not having previously assigned" the term; whereas it is obvious, that, if the trustee has "previously assigned" it, his second as-

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signment must be inoperative. It is *possible* that, in such a case, a person having the deeds relating to the term might, under some circumstances, prevail in equity against a person to whom it had been previously assigned, (vide ante, Vol. 5, p. 487); but clearly he would derive no advantage from taking an assignment, unless, perhaps, as establishing, more conclusively than could otherwise be done, a claim against the trustee for the fraud thus practised upon him. If an intended mortgagee had ground to suspect any improper dealing with the term on the part of the trustee, he would of course not accept the security. *A purchaser* previously bound by contract may be in the dilemma suggested.

Term excludes dower, though not assigned until the death of the husband.

One of the objects for which satisfied terms of years are still frequently found to be useful, is, to protect against dower, in cases not within the stat. 3 & 4 Will. 4, c. 105; in regard to which it may be noticed, that a term created previously to the inception of the right of dower will exclude it, though not actually assigned until such right has attached by the death of the husband. Vide ante, Vol. 1, 503.

Thus, if A., seised in fee, mortgage his lands to B. for a term of years, and then marry, (or, being married, his wife duly join in the mortgage), and afterwards he mortgage the same lands in fee to C. and die, leaving his widow surviving him, the second mortgagee might exclude the dower of the widow, by taking an assignment after the death of A. of the term vested in B., the first mortgagee. See *Wynn* v. *Williams*, 5 Ves. 130; *Mole* v. *Smith*, Jac. 490, stated ante, Vol. 1, p. 508. But such an assignment must of course be made while the dower remains a *right* only, and would be inoperative to exclude the widow, after her dower had by judicial process been assigned to her by metes and bounds, by which means she had acquired an actual *estate* in the portion of the lands so assigned.

As to keeping one's own term on foot.

It rarely happens that where a person pays off an incumbrance of his own creation, he keeps on foot the satisfied term limited for securing it: and the preservation of the term cannot be recommended unless the owner were about to sell or mortgage the property; in which case (especially if the merger would have the effect of letting in dower or judgment debts, against which the term in the hands of a purchaser or mortgagee would afford protection) it would be advisable to vest the term in a trustee in trust to attend the inheritance.

Doctrine of presuming surrenders of terms.

It is now settled, that an attendant term of years is no protection against Crown debts; *King* v. *Smith*, 3 Sugd. Vend., Append. 36; ante, Vol. 5, p. 71; and as a protection against other incumbrances, it is to be relied upon with caution where the term has not been recently assigned, in consequence of the modern doctrine of presumption above alluded to.

[The following statement as to obtaining probate or administration, for the purpose of assigning a term, is taken from the Second Report of the Real Property Commissioners, p. 67; see also ante, Vol. 1, pp. 177, 266.]

The proper court where the will of a trustee of a term must be

[A will must be proved and letters of administration must be taken out in the court of the ordinary who has jurisdiction over the assets of the testator or intestate. If the trustee of a term die, leaving personal effects, all of which, including the land in the term, are within the juris-

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proved or administration to his effects taken out.

diction of the same court, his will ought to be proved or administration ought to be taken out in that court. If he die, leaving personal effects in one diocese or peculiar, the land in the term being in another diocese or peculiar within the same province, either Canterbury or York, his will ought to be proved or the letters of administration ought to be taken out in the prerogative court of that province. If he die, leaving personal effects within one of the two provinces, and the land in the term be within the other province, for the purpose of administering his assets, exclusive of the term, the will must be proved or the letters of administration must be taken out either in the prerogative court of that province or in an inferior court, as circumstances may require; but, on account of the term, the will must also be proved or administration must also be taken out, either in the prerogative court of the other province, or, if he had no other assets within that province besides the term, in the inferior court of the ordinary having jurisdiction over the place where the land in the term is situated.]

How to make available an assignment of a term from the executor of a trustee, whose will has been proved in a wrong court.

[If the will of a deceased trustee of a term be proved in an inferior court, not having jurisdiction over the place where the land in the term is situated, or in an inferior court having such jurisdiction, when the testator left other assets out of that jurisdiction, but within the same province in which the land in the term lies, or in the prerogative court of one province, when the land in the term is within the other province, and the executor so proving should assign the term; yet although he could make the assignment, no use could be made of it, as the probate he had obtained would not, in proving the title to the term, be admitted as evidence to prove that he was the executor. But the assignment, though made by an executor who, as to the term, has not proved the will in the proper court, will be rendered available if the will should, either in the lifetime of the executor, or after his decease, be proved in the court in which it ought to have been originally proved with reference to the term, as part of the assets of the testator, as such subsequent probate would, in proving the title to the term, be admitted as evidence to prove that the person who assigned it was the executor.]

Assignment of a term from a person who has administered in a wrong court absolutely void.

[If administration to a deceased trustee of a term who died intestate be taken out in an inferior court, not having jurisdiction over the place where the land in the term is situated, or in an inferior court having such jurisdiction, when the intestate left other assets out of that jurisdiction, but within the same province in which the land in the term lies, or in the prerogative court of one province, when the land in the term is within the other province, an assignment of the term by the administrator would be absolutely void.]

Modern practice to avoid the transmission of the will of a trustee of a term to the prerogative court, where the will has been proved in a wrong court.

[If all the assets of a deceased trustee of a term, including the term, be in the same province, and his will be proved in an inferior court not having jurisdiction over the place where the land in the term is situated, or in an inferior court whose jurisdiction embraces the land in the term, but does not extend to the other assets, according to a practice recently adopted, to avoid the transmission of the will from the inferior court to the prerogative, letters of administration limited to the effects of the deceased trustee, so far as regards the term, are granted by the prerogative court to some person for the purpose of assigning the term, and in that

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case the title to the term, even if it should have been previously assigned by the executor of the trustee, is traced from the trustee through the medium of the assignment from the limited administrator.]

Assignment of terms.

[If a trustee of a term has died intestate, and it should at any time afterwards be requisite to have the term assigned, and at the time of requiring the assignment there should be no administrator of the deceased trustee, or, being such, he should have derived his qualification from a court whose jurisdiction does not embrace the land in the term, it is usual, in these cases, for the purpose of assigning the term, to obtain letters of administration limited to the effects of the trustee so far as regards the term.]

Limited administrations from the prerogative court preferred.

[If a trustee of a term has died intestate, and his assets including the term, should, so far as they are known, be confined to one inferior jurisdiction, or, exclusive of the term, should, so far as they are known, be confined to one province, and the land in the term should be within the other province, and it should be necessary to obtain limited letters of administration for the purpose of assigning the term, in either of these cases, notwithstanding a limited administration from the inferior court, whose jurisdiction embraces the land in the term, might be sufficient, yet in practice a grant from the prerogative court, although more expensive than a grant from the inferior court, is generally preferred. Because, an administration granted by a prerogative court, when it has no authority to do so, is good till repealed, and all the mesne acts of the administrator are valid; but an administration granted by an inferior court, when the same ought to have been granted by the prerogative court, is absolutely void, and all the mesne acts of the administrator are invalid: so that the assignment of the term by the limited administrator from the prerogative court would stand good, although that court, supposing the intestate not to have left assets, including the term, in more than one inferior jurisdiction, may have exceeded its authority in making the grant; on the other hand, the assignment of the term by the limited administrator from the inferior court would be absolutely void, if it should afterwards be discovered that the intestate left assets in more than one inferior jurisdiction.]

It frequently happens that probate or administration is not obtained in the proper court.

[It hardly ever happens that the executor or administrator of a deceased testator or intestate knows that such testator or intestate was trustee of a term; consequently the will is proved or letters of administration are obtained in that court where the ordinary has jurisdiction over the assets with which the person proving or obtaining administration is acquainted.]

[Trustees of terms in estates of any magnitude are usually selected out of persons who leave assets sufficiently extensive to require a prerogative probate or administration. Consequently, an inadequate probate or administration, with reference to a term vested in a deceased trustee, is in these cases rare, except when the assets of the deceased trustee, exclusive of the term, are in one province, and the land in the term is in the other province.]

[Trustees of terms in small estates are generally persons whose assets, without taking the terms into account, do not require prerogative probates or administrations, and their wills are proved, or administrations to their effects are taken out, in the inferior courts in which their

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assets, without regard to the terms, happen to be, and very frequently the lands in the terms are out of the jurisdictions of the courts where the probates or letters of administration were obtained.]

[The chances against a will being properly proved, or of letters of administration being properly taken out, with reference to a term, are greatly increased from the circumstance of there being so many courts in which wills are proved and by which letters of administration are granted. It appears, from the Parliamentary returns made in the year 1828, that, exclusive of the two prerogative courts of Canterbury and York, there are in those provinces inferior courts for proving wills, such as bishops', archdeacons', deans', and chapters', prebendaries', lords of manors', and others, to the extent of about 370, and that the jurisdiction of many of these courts does not extend beyond a few parishes, and that the jurisdiction of some of them does not extend beyond one parish or manor.]

[Instances daily occur in which, with a view to enable parties to trace titles to terms assigned by executors who have not proved wills in proper courts, or with a view to make assignments of terms, or with a view to recover or defend the possession at law, it is necessary, from some or other of the causes above stated, either to prove the wills of deceased trustees of terms in other courts, or to take out administrations to their effects. The proving of a will or the taking out of administration occasions considerable delay in every transaction in which it is required, and the expense attending it is a serious tax on the landed proprietor; and it is obvious that the extent of the evil is in proportion to the number of wills or administrations to be proved or taken out.]

Notice of purchase should be given to the trustees of the term.

The practice formerly adopted of introducing into purchase or mortgage deeds a declaration that all satisfied terms should attend the inheritance in trust for the purchaser or mortgagee, instead of assigning the term to a trustee for him, is now very generally and properly abandoned; inasmuch as such a declaration does not afford the same protection to a purchaser or mortgagee as an actual assignment. The observations which have been made in another place, as to the danger of mortgagees leaving terms outstanding, apply with equal force to purchasers. (Vide ante, Vol. 5, p. 487). One suggestion, however, may here be added, namely, that, if the precaution of assigning the term be not taken, notice of the purchaser's title should be given to the trustee in whom it is vested, after which it would be clearly a breach of trust in him to assign the term to any other person. Indeed, it seems to be the better opinion, that a trustee, having received such notice, could not, by his assignment, transfer to a third person the benefit of the legal title, unaffected by the trust which attached to the estate in his hands; for there is strong ground to contend, that the notice operates as an appropriation of the benefit of the attendant term, by the person giving it constituting the termor *his* trustee; and then, it would seem to be contrary to the first principles of equity, that a trustee should be able to confer a title on a person *avowedly dealing with him in that character*, discharged from the trust. (See some ingenious observations, Hayes's Concise Conv., p. 206.) And this conclusion seems to be fortified by the decisions establishing the doctrine, that notice to the owner of the legal title confers precedence among contending equitable aliences; (vide ante, Vol. 5,

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p. 458); for it is impossible, on any intelligible principles, to except terms of years from the operation of this doctrine.

[Until the decision in the case of *Jones* v. *Jones*, 8 Sim. 633, ante, Vol. 5, p. 471, it was very generally understood, that the salutary doctrine of *Dearle* v. *Hall*, &c., applied to real as much as to personal estate. The importance of the subject will perhaps be an excuse for the insertion in this place of some observations, the substance of which has already appeared in another form.]

Notice to trustees.

[It will be proper, in the first place, to relieve the argument from the weight which is generally attributed to *Jones* v. *Jones*, as a *decision* on the point; but to which an examination of the circumstances will shew that it is not entitled. The property in dispute in that case consisted of a legal remainder in fee-simple devised to Eliza Whitworth, and a legal estate for life devised to her by another testator*. Eliza Whitworth married F. L. Brown, and, by her marriage settlement, conveyed her remainder in fee to such uses as she and her husband should jointly appoint. This settlement was intrusted to the keeping of William Jones, the solicitor to the parties. The Browns afterwards demised the life estate, and appointed the remainder in fee to William Jones by way of mortgage, and subsequently joined in a transfer of the mortgage and a further charge to Jane James, a client of William Jones, who left the deeds in his hands, as solicitor. The Browns then made a mortgage of both estates to John Jones, without disclosing the former charges, or any thing beyond the wills and the settlement. Lastly, the Browns executed a mortgage of the two estates to John Harris, disclosing the mortgage to Jane James, but concealing the subsequent mortgage to John Jones; and Harris caused a notice of his mortgage to be indorsed on the settlement. Now, it is obvious that these circumstances did not raise the question in *Dearle* v. *Hall;* the doctrine of which case is shortly this: that where a person has an equitable interest of such a nature that he cannot make out a title at all, without shewing that the legal title is outstanding in a trustee, every one dealing with that interest is bound to inform the trustee of his dealings, in order that parties to whom it may subsequently be offered may have it in their power to ascertain the existing charges upon it. In *Jones* v. *Jones*, the title which was made out to John Jones was a legal title in the Browns themselves; and he was not aware even of the mortgage to Jane James. There was no trustee to whom he could give notice. The notice indorsed on the settlement by Harris was not notice to any trustee of the property; nor was it any effectual protection against fraud by the Browns; for the settlement might have been suppressed, or the notice erased, without any fear of detection. The Vice-Chancellor, however, considered that the case fell within the doctrine of *Dearle* v. *Hall*, if that doctrine could be extended to real estate; and he held that it could not be so extended. Now if, as is incontestible, the circumstances of *Jones* v. *Jones* did not raise the question, his Honor's judgment amounted to a mere extra-judi-

Observations on the doctrine in *Jones* v. *Jones*, that it is but necessary to give notice of an assignment of an equity in land to trustees.

* [Each of these estates was devised to trustees, *in trust* for E. Whitworth; but, in such a manner, that the trust was executed as a use by the statute.]

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cial dictum; and even as such, is not entitled to the weight which is in most cases justly attributed to opinions from the bench, because it bears internal evidence of having been pronounced under a misapprehension of the very doctrine which it professes to limit.]

[The doctrine of *Dearle* v. *Hall* was, no doubt, borrowed from the enactments in the Bankrupt Acts against reputed ownership, (with which, however, it has no necessary connection), and hence the frequent reference in the cases on that doctrine to personal chattels and choses in action. Sir *T. Plumer* relied very much on the dicta of the common law and equity judges in the great bankruptcy case of *Ryall* v. *Rowles*, 1 Vez. sen. 371, 1 Atk. 182. Indeed, the opportunities for the application of the doctrine are of much more frequent occurrence under titles to personal than to real property, for the obvious reason, that merely equitable titles to real estate are not common, except in the form of equities of redemption; and then they are often cloaked with a fictitious legal title, which excludes the doctrine in question, (even if it could under any circumstances be applied to the case of a mortgage, a point upon which some doubt appears to have been thrown in the case of *Bugden* v. *Bignold*, infra, p. 120). But in cases which have fairly come within the principle of *Dearle* v. *Hall*, I believe it can be shewn, that the doctrine of that case *has actually been held to apply to real estate.*]

[That there is nothing in the principle of the doctrine to confine it to personal estate, is very apparent. At the conclusion of the argument in *Dearle* v. *Hall*, Sir *T. Plumer's* language was as follows:—"The plaintiffs had been negligent, and, in consequence of their negligence, third parties had been involved in transactions which could not have taken place, if the first purchasers, by omitting to communicate their claims to the legal owners of the fund, had not put it out of the power of those legal owners, though acting with perfect fairness and honesty, to represent to the subsequent purchaser the true state of the circumstances. Where a purchaser, by his negligence, places a subsequent purchaser, who has acted with all due caution, in such a situation that loss must fall either upon the one or the other, he who has been in default, and has caused the mischief, ought not to be saved harmless at the expense of an innocent party."]

[These are equitable reasons of the most general application that can be imagined, and cannot, on any rational ground, be confined to one particular species of property. In his subsequent judgment, Sir *T. Plumer* enlarged upon this topic, and mainly relied on it in support of his decision; at the same time introducing the notion, which has since been so much insisted on, of *completing* the equitable title. But I prefer quoting the concise summary of the grounds of Sir *T. Plumer's* judgment, given by Lord *Lyndhurst* in the House of Lords, in the case of *Foster* v. *Cockerell*, 3 Cl. & Fin. 475: "The reason on which his Honor adopted that principle, as the rule for his decision, seems to have been, that, if a contrary doctrine was allowed to prevail, it would enable a cestui que trust to commit a fraud, by enabling him to assign his interest first to one, and then to a second incumbrancer, and perhaps, indeed, to a great many more; and these latter incumbrancers would have no opportunity of ascertaining, by any communication with the trustees,

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whether or not there had been a prior assignment of the interest on the security of which they were relying for provision for their claims. Another principle acted upon by the Master of the Rolls was, that a party, till he gave notice to the trustees, had not done every thing that was necessary to complete his title. I fully agree with that principle. In a case of this sort, it is necessary that a party, claiming advantage from a title, should do every thing that is requisite to complete that title, before he sets up a claim in respect of it. The Master of the Rolls was also of opinion, that the trustees themselves were entitled to notice on their own account; and that, till notice was given to the trustees, they did not, in fact, become trustees for the assignee."]

[So far from these grounds pointing exclusively at personal property, they have a more especial reference to the old maxims of the law, in regard to realty. The object proposed by the rule is publicity and the prevention of secret alienations, the very same end that was contemplated in the feudal requisites of livery of seisin, entry, or attornment, as essential to the transfer of every interest in land. At the common law no title to real property could be completed without the knowledge of every party concerned in interest. What is the foundation of the whole doctrine of getting in outstanding terms, but this very notion of "completing the title?" If you purchase an estate and take an assignment of an outstanding term, you appropriate the benefit of it. If you make the old trustee a party to your conveyance, you equally appropriate the benefit of it; but, if you merely declare in your conveyance that all terms shall attend your estate, and have no dealings with the trustees of them, you gain no advantage over a later claimant. "*The term must be got in in some sense,*" said Lord *Eldon*, in *Maundrell* v. *Maundrell*, 10 Ves. 271, "either by taking an assignment, *making the trustee a party to the instrument, or taking possession of the deed creating the term.*" If these means are sufficient, as Lord *Eldon* has repeatedly laid it down that they are, to entitle a purchaser to the benefit of an outstanding legal estate, *which he does not clothe himself with*, the very point seems to be determined; and we may assert, on the authority of Lord *Eldon*, that an equitable incumbrancer on real estate may, by merely giving notice to a trustee of the legal estate, gain priority over a former incumbrancer who has neglected to do so, and of whose charge neither party has any notice. See, too, *Earl of Pomfret* v. *Lord Windsor*, 2 Ves. 485.]

[The language of Sir *J. Wigram*, V. C., in his recent and elaborate judgment in the case of *Meux* v. *Bell*, 1 Hare, 83, although, with that caution which always accompanies great judicial abilities, his Honor carefully follows the language of former authorities, seems to be strongly confirmatory of this view. The question being, in what manner the notice should be given, his Honor observed, "If the trustee has actual knowledge at the time the transaction takes place, I have always understood the principle of law to be, that what a man knows for one purpose he knows for all; and you do not inquire whether he learnt it in one character or in another." And, referring to the case of *Timson* v. *Ramsbottom*, 2 Kee. 35, where Lord *Langdale*, M. R., held that notice to one of two executors was insufficient as against an incumbrancer who took his charge after the death of that executor, although, in *Smith*

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v. *Smith*, 2 Cr. & M. 231, notice to one of two trustees, who was living when the second transaction took place, was held sufficient, Sir *J. Wigram*, V. C., said, "Having got rid of the technical objection, that notice to one is notice to all, the question was reduced to this: at the time when the second incumbrancer took his security, was there any person living who had notice of the prior incumbrance being created?" Again, "The reason why notice to one has been held sufficient is, because nothing less than inquiry of all the trustees would satisfy a prudent inquirer." Nothing can be more opposed than this to the notion that there is any technical efficacy in thus "completing the title" to a fund, independently of the equitable merit of protecting after-comers.

[I am not aware of any cases antecedent to *Dearle* v. *Hall* that are opposed to the extension of the doctrine to real estate; but if any such could be found, they would now be inadmissible as authorities; because the doctrine was never recognized, even with regard to personalty, until Sir *T. Plumer* established it in that case. In *Wright* v. *Lord Dorchester*, 3 Russ. 492, Lord *Eldon* thought the point too doubtful to be decided on an interlocutory application. In *Cooper* v. *Fynmore*, 3 Russ. 60, Sir *T. Plumer* himself decided against the claim of a party who had given notice to the trustees of a personal fund; and in *Tourville* v. *Naish*, 3 P. W. 307, Lord *Talbot* also decided in direct opposition to what is now the law. In the last-mentioned case, one of two executors, who was also residuary legatee, assigned a part of his legacy to A., and then assigned the whole of his interest to his co-executor, who had no notice of the prior disposition. Lord *Talbot* held that A. had priority, although it is now settled, that, where the alienee of the fund is also one of the trustees, no further notice is necessary; *Ex parte Smart*, 2 Mont. & Ayr. 60; but, on the other hand, if the *owner* of the fund is one of the trustees, the notice which *he* has is ineffectual*. *Ex parte M'Turk*, 3 Mont. & Ayr. 1.]

Peacock v. *Burt.*

[The case of *Peacock* v. *Burt*, before Lord *Cottenham*, when Master of the Rolls, 13 Law J. 35, ante, Vol. 5, p. 447, has been cited on both sides of the question, although it does not throw much light on either. In that case, A. made a legal mortgage to B.; he then mortgaged to C., who had notice of B.'s mortgage, and gave him notice of her own. Lastly, A. obtained an advance from D. on the security of the estate, D. paying off B., and taking a conveyance of the legal estate from him, without being informed of C.'s charge. The question was not whether B. should be answerable to C. for concealing her claim, but whether D. could be deprived of the benefit of the actual legal estate; and the Master of the Rolls of course held that he could not. "The third mortgagee," said that distinguished judge, "who is to all intents and purposes a purchaser for valuable consideration, being without notice, is entitled to the full benefit of his legal rights and remedies. It has been supposed that the cases of *Dearle* v. *Hall*, &c. determine the point; but, in my opinion, the decisions in these cases proceeded on different principles;

* [The doctrine in *Duncan* v. *Chamberlayne*, 11 Sim. 123, and *Ex parte Rose*, 2 Mon. D. & D. 131, 213, to the contrary, is clearly untenable. See *Kennedy* v. *Green*, 3 Myl. & K. 698, ante, Vol. 5, p. 490.]

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they merely decided, that, as between parties having equities only, he who first gives notice obtains priority; and this is apparent when we look at the grounds on which those cases were decided. Sir *T. Plumer* proceeded on the principle, that it was not possible to transfer the legal interest; and that, whenever it is intended to complete the transfer of a chose in action, there is a mode of dealing with it which a court of equity considers tantamount to possession, namely, notice given to the legal depository of the fund. 'The question here is,' says his Honor, 'not which assignment is first in date, but whether there is not, on the part of Hall, a better title to call for the legal estate.' [Almost the very words used by Lord *Eldon*, with reference to real estate.] So, again, Lord *Lyndhurst*, in affirming the judgment of Sir *T. Plumer*, states, as a reason for coming to the same conclusion, that the act of giving the trustee notice was, in a certain degree, taking possession of the fund; and that it was going as far towards equitable possession as it was possible to go. *So that those cases, as far as they apply, are very strong decisions in favour of D.;* for they decide, that a second incumbrancer without notice, having obtained a quasi legal title in a chose in action, gains a priority over the prior incumbrancer. Here D. has the actual legal estate." The point in *Peacock* v. *Burt* was different from that in *Dearle* v. *Hall*, &c.; but those cases could not favour D.'s claim, if the principle of them did not apply to real estate. If they were inapplicable to real estate, the Master of the Rolls would have said so, instead of striving to distinguish the circumstances from those before him. An equitable title to land is as much a chose in action as an equitable title to money. In *Foster* v. *Cockerell*, the rule was applied to a fund charged on real estate; so that the doctrine in *Jones* v. *Jones* must be carried to this extent,—that, if an equitable owner mortgages to A. and then to B., B. can gain no priority by giving notice; but if A. mortgages his charge (which is personalty) to C., and then to D., C. may be postponed by D.'s notice, and yet the property in question in both cases is identical.]

[It only remains to examine the arguments of the Vice-Chancellor in *Jones* v. *Jones*, as they are to be collected from the report. His Honor is reported to have said, that, according to *Peacock* v. *Burt*, the notice in that case was of no value. Now, it is evident that Lord *Cottenham* did consider the notice to be of value, but of less value than the actual legal estate. His Honor then cited the observation of Lord *Eldon* in *Hiern* v. *Mill*, 13 Ves. 114, that "There is a marked distinction between a real estate and a personal chattel. The latter is held by possession, a real estate by title." That remark was merely made to shew that a vendor's possession of an estate should not induce a purchaser to shut his eyes to circumstances, such as the absence of the deeds, which might lead to a discovery of outstanding rights; although the possession of a personal chattel is a good primâ facie title. But what has this to do with equitable titles, where there is no possession? *Peter* v. *Russell*, 2 Vern. 726; *Beckett* v. *Cordley*, 1 B. C. C. 353; *Evans* v. *Bicknell*, 6 Ves. 174; *Martinez* v. *Cooper*, 2 Russ. 214; and the other cases of that class, where the neglect of leaving the title-deeds in the hands of the mortgagor, unaccompanied by any fraudulent intention, was held insufficient to postpone a mortgage, were all cases where the mortgagee had the

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legal estate*; and, besides, are a little shaken by the decision in *Whitbread* v. *Jordan*, 2 You. & C. 303. In the only case where the question arose between merely *equitable* incumbrancers, the party neglecting to secure the deeds *was* postponed, although no fraud was imputed to him. *Stanhope* v. *Earl Verney*, 2 Eden, 81; Butl. n. Co. Litt. 290. b.]

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[Upon the whole, it appears that this question, if not actually concluded by authority against the dictum in *Jones* v. *Jones*, is at least not settled the other way; and, therefore, until it shall be so determined, prudence, as well as an honest wish to prevent fraud, will dictate the propriety of giving notice in every case of an incumbrance upon an equitable interest, without regard to its nature. The caution given by Sir *T. Plumer* in the principal case should not be forgotten: "A solicitor neglecting to give notice would find it difficult to make out that he had not become responsible to his client †."]

Priority of Incumbrances.

Bugden v. *Bignold.*

[The point was a little discussed in the recent case of *Bugden* v. *Bignold*, 2 You. & C. C. C. 377, where, however, it seems not to have arisen. The facts were these. Milbank was entitled to a freehold estate subject to a mortgage for years to Sir J. T. for £1500, and to a copyhold estate subject to a surrender by way of mortgage for £1500 to the use of Gilson; the legal estate in the copyholds being in Bawtree, who appears to have been a satisfied mortgagee. In October, 1830, Milbank mortgaged the freeholds in fee to Bignold, the secretary of the Norwich Union Society, for £1500, advanced by the society. At the same time the Norwich Union Society paid off Sir J. T.'s mortgage, and took an assignment of the term to a trustee for them. In 1830, Milbank borrowed of the society a further sum of £1000, and charged it on the freeholds, making in all £4000. In 1832 they advanced him £500 more, and took a further charge on the freeholds and a conditional surrender of the copy-

* ["The question here," said Sir *T. Plumer*, in *Dearle* v. *Hall*, "is not, as in *Evans* v. *Bicknell*, whether a court of equity is to deprive the plaintiffs of any right,—whether it is to take from them, for instance, a legal estate, or to impose any charge upon them,—it is simply whether they are entitled to relief against their own negligence."]

Priority by serving distringas where there is no trustee.

† [It may be here mentioned that when a trustee of stock in the funds is dead without legal personal representatives, an assignee of any present or reversionary equitable interest in such funds, who neglects to serve a writ of distringas upon the Bank of England, will be postponed to a subsequent incumbrancer who has taken that precaution, and consequently to an incumbrancer who, when a trustee of the fund has been again constituted by representation, has been diligent enough to have first served such trustee with notice. *Etty* v. *Bridges*, 2 You. & C. C. C. 486. As to the form of the distringas and mode of service, see that case and *Reg. Gen.*, 17th Nov. and 10th Dec., 1841; and see the stat. 5 Vict. c. 5, ss. 4 & 5; *Ex parte Marquis of Hertford*, 1 Hare, 584; 1 Phill. 129: *Ex parte Amyot*, Id. 130; *Ex parte Field*, 1 You. & C. C. C. 1. When there is a fund in court, priority is gained by procuring a stop order. *Greening* v. *Beckford*, 5 Sim. 195, ante, Vol. 5, p. 297. As to obtaining a stop order, see 4 Beav. 34, 419, 521; 5 Id. 133, 388; 7 Jur. 11; 12 Sim. 264.]

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holds to secure the same sum, with a contemporaneous deed of covenant referring to Gilson's mortgage. No notice of the freehold security was taken in that on the copyholds, or vice versâ. In 1833, Milbank executed a mortgage of the freeholds to Round & Co. for £400, reciting, that the lands were charged, by way of mortgage to Bignold, with £4500, *but not referring to the copyholds.* In 1837, this security came to the knowledge of the N. U. Society. In March, 1838, the N. U. Society paid off Gilson, and took a transfer of his security by way of assignment and covenant to surrender. The surrender was made to a trustee for the society in February, 1840. In July, 1838, the freeholds were sold by the society for £5000. In September, 1838, Milbank executed a mortgage of the copyholds, by way of covenant and surrender, to Bugden, the plaintiff, as a security for £600. In the mortgage-deed it was recited, that Milbank was seised in fee, "subject to a certain conditional surrender made on or about the —— day of ——, 183–, whereby the said hereditaments were assured to J. Bignold, his heirs and assigns, for securing £1500 and interest, advanced by him in discharge of a debt due to B. Gilson on the security of the premises. It does not appear by the report that the plaintiff had notice of the £500 charge on the copyholds. In December, 1838, Round & Co., having ascertained that the produce of the freeholds would not be sufficient to pay both the N. U. Society and themselves, required the former to resort to the copyholds; and, in 1839, the N. U. Society sold the copyholds for £2000. It did not appear that either the N. U. Society or Round & Co. had notice of the plaintiff's claim before 1840, when he served a notice on the former. Sir *J. L. Knight Bruce*, V. C., held that the sum of £500 was charged on the freehold and copyhold rateably, (that is, in proportion to their respective net values), and that neither Round & Co. nor the plaintiff had any equity to disturb that distribution; so that the former could not throw the whole of the charge of £500 upon the copyhold, nor could the plaintiff throw it entirely upon the freehold. It was contended, that the language of the security to the plaintiff was sufficient to put him upon enquiries as to Bignold's claims, which would have led to a knowledge of the charge of £500; but his Honor was of opinion, that the plaintiff had no constructive notice of that charge, and that the court-rolls were clearly not notice. (Vide ante, Vol. 1, p. 103). The fact was, that the legal estate in the copyholds was not in Bignold, but in a trustee; the information, however, given to the plaintiff was, that it was in Bignold. On the other hand, Round & Co., although they had given notice of their security to Bignold, had not given notice to Gilson or to Bawtree; nor does it appear from the report that they knew the legal estate was outstanding in them. The case was twice argued, and it was attempted to bring it within the principle of *Dearle* v. *Hall*, &c., on the ground of the sale by Bignold. *Jones* v. *Jones* was cited. "The plaintiff," said his Honor, "who does not appear to have had any notice of Bawtree's security, or of Gilson's security, or of Gilson's, or his son's, or Bawtree's existence—except that, if any, constructively afforded by the security of 1838—was not, in my opinion, bound to make any enquiry of either of them, or of Mr. Bignold or the Norwich Union Society. Neither Gilson, nor his son, nor Bawtree, appear to

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have known or had any notice of either of the securities for £500, or of the existence of the freehold estate, or of the existence of Messrs. Round & Co., as incumbrancers. The Norwich Union Society, though, when paid off, they would become trustees, or, in a sense, trustees of the surplus, if any, of their securities, were incumbrancers, and they and their own trustees, though bound not to answer falsely any question that might be put to them, were, in my opinion, *at least while the copyhold remained unsold**, entitled to decline answering any question which might have been addressed to them by the plaintiff upon the subject of the copyhold; unless, indeed, the plaintiff had proposed to redeem the Norwich Union Society, which it does not appear that he ever intended or desired." His Honor then observed, that the prior notice by Round & Co. to Bignold did not, as between Round & Co. and the plaintiff, advance or improve the claim of the former; and added—"It may be said, that, after the second of the notices from Round & Co., it was competent to Mr. Bignold, while ignorant of the plaintiff's security, to give Round & Co. the benefit of paying the £500 partially, if not wholly, out of the copyhold estate, and to settle with them on that principle without incurring any liability. This, however, was not done; and, notwithstanding the conversion of the copyhold into personalty by the sale, I think, both upon principle and authority, (authority not confined to *Jones* v. *Jones*), that the notices, as I have said, did not gain for them a rank which otherwise they had not. I think that the rights of the plaintiff were fixed by his security of 1838, while the copyhold property was, in every sense, real estate; fixed, at least, for every purpose that the circumstances of this case can bring under consideration. It has been indeed but slightly, if at all, contended that *Loveridge* v. *Cooper*, 3 Russ. 30, and *Foster* v. *Blackstone*, 1 Myl. & K. 297, apply to this case."

Marshalling securities.

"I think the marshalling claimed by Round & Co. excluded; because the plaintiff took, in my opinion, his security without notice that it was subject to more than the £1500, and without laches or default as between him and them, and because Round & Co., without marshalling, are left at least in the enjoyment of all they contracted for in the mode and form in which, and according to the quantity for which, they, *whether ignorant or not ignorant of the existence of the copyhold estate*, contracted." His Honor added, that his chief difficulty was in deciding against the plaintiff's claim to throw the entire charge upon the freehold.]

Observations on *Bugden* v. *Bignold.*

[The above decision is perhaps open to some observation; and there seems to be ground for contending, either that it went too far against the claims of Round & Co., or not far enough. Round & Co. had taken a security upon the freeholds expressly subject to the whole of Bignold's charge, and without being informed that that charge was

Priority by notice to a mortgagee.

* [It is not easy to see how this could make any difference; no information as to incumbrances puisne their security could in any way prejudice the sale of the property, because a purchaser from them would take clear of such incumbrances. It is apprehended that there is no authority or principle for confining the rule in *Dearle* v. *Hall*, &c. to cases where the trustee has no interest. Such a restriction would deprive the doctrine of half its utility.]

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available against the copyholds; at least his Honor's decision is based on the assumption, that it was immaterial whether they knew it or not. If they did know it, however, it must be taken that they had in view the equity that would accrue to them of marshalling the charge upon the copyholds; and so impliedly contracted for an indirect, but not the less a specific, charge upon the copyholds. If they did not know it, whatever right of marshalling they might subsequently be able to assert would not, at any rate, be a right springing from contract. But with the plaintiff, Bugden, the case was different. He contracted specifically for the copyholds, and in ignorance of the charge of £500 upon them; he therefore had a distinct right to throw that charge off upon any other property, independently of any question of marshalling; so that, if he could have got the protection of the legal estate, he might have resisted the claims even of Bignold himself. In this view, therefore, it was of essential importance to determine whether or not Round & Co. had knowledge of the charge upon the copyholds when they took their security. If they had, they contracted for a right to marshal, and thus acquired an equity of the same kind as the plaintiff's, and such as, being prior in date, should have taken entire precedence of his; if they had not, their right to marshal, not springing from contract, was inferior to the plaintiff's specific right, and should have been entirely postponed to his. His Honor seems at one time to have entertained this view, but the reasons which induced him to abandon it do not appear. The distinctions as to tacking established in the cases referred to, ante, Vol. 5, p. 436, (and see *Bovey* v. *Skipwith*, 1 Ch. Ca. 201), seem to be entirely in accordance with the doctrine now contended for. A mortgagee, by different deeds, of Blackacre and Whiteacre for different debts, may, by the practice of the court, treat the mortgages as one against the mortgagor coming to redeem; he may therefore be considered to have contracted for that privilege when he took the second mortgage, and will consequently be allowed to insist on it against a subsequent mortgagee of one estate without notice of the deficient security on the other; provided, of course, that the legal estate is in the first mortgagee, so that the second is obliged to seek relief against *him*. (*Jones* v. *Smith*, 2 Ves. jun. 376). But where A. mortgaged Blackacre to M., and then devised the equity of redemption to B.; and B. mortgaged Whiteacre to N., and devised the two estates to different classes of devisees, and then N. purchased his mortgage security, it was held, that he could not insist on a joint redemption even as against the volunteers; for not having contracted for the specific right of tacking, he had not appropriated such a right to himself, and could not claim the benefit of it in a case which, as the equities of redemption although once united * were now in different persons,

Marshalling securities.

Tacking of distinct mortgage.

* [In *Roe* d. *Kaye* v. *Soley*, 2 W. Bl. 726, two distinct equities of redemption having become united in the same person, the owner himself, coming to redeem under the stat. 7 Geo. 2, c. 20, was not allowed to redeem one without the other. If the application has been made by a puisne mortgagee with or without notice, the decision should have been different. Upon the same principle it was held that a judgment creditor claiming under the Statute of Westminster having, as he was compelled to do,

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did not come within the strict letter of the rule. *White* v. *Hillacre*, 3 You. & C. Exch. 597; as to the other point in which case, viz., whether a mortgagee can sue both in that character and as a general creditor, see *Skey* v. *Bennett*, 2 You. & C. C. C. 405.]

Marshalling securities.

[Unless, however, the decision of Sir *J. L. Knight Bruce*, in *Bugden* v. *Bignold*, ought, upon the question of marshalling, to have been entirely in favour of Round & Co., the point as to the necessity of giving notice to the trustees of the legal estate did not arise. The same learned Judge had already considered the doctrine of marshalling in a case of *Barnes* v. *Racster*, 1 You. & C. C. C. 403. In that case, Racster, being seised of Foxhall Coppice, and of a piece of land, marked in a plan of the estate "No. 32," mortgaged, in

Barnes v. *Racster.*

When there are two conflicting rights to marshal a charge upon the same property, they shall take effect rateably, notwithstanding notice.

1792, Foxhall to Barnes; in

1795, Foxhall to Hartwright; in

1800, Foxhall and No. 32 to Barnes for a further advance, charging that and the former debt on both estates; and in

1804, Foxhall and No. 32 to Williams.

The puisne charges were taken with notice of the prior charges; but it does not appear from the report, and, perhaps, cannot be considered as material, whether Hartwright was acquainted with the second security to Barnes before the security to Williams was made. In *Bugden* v. *Bignold*, it was, in effect, decided that that circumstance was immaterial. The securities were insufficient to pay all the demands. Foxhall was not sufficient to pay the first charge upon it, but No. 32 was sufficient to pay both debts due to Barnes. It was held that Hartwright had no equity to throw the whole of Barnes's demands upon No. 32, but that "Hartwright and Williams stood on an equal footing; that Barnes must be paid out of the respective proceeds of No. 32 and Foxhall, pari passu, rateably according to their amounts; that the residue of the produce of Foxhall must be applied towards paying Hartwright, and that the residue of the produce of No. 32 must be applied towards paying Williams." The effect of this decision was to give to Hartwright some benefit from the second mortgage to Barnes, but not all the benefit which he would have had if the mortgage to Williams had not been made, namely, the right of marshalling as against volunteers; while, on the other hand, it took from Williams the right of marshalling which he would have had if Hartwright's equity, as recognized by the Court, had not existed. That Williams could marshal to the exclusion of Hartwright, was not, of course, contended. The important result of the case appears to be this: that the right of making a charge upon specific property available by marshalling against another property not specifically contracted for (although superior to the rights of the gene-

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redeemed the entire estate from the mortgagee, was entitled to tack the judgment debt to the mortgage against the entirety, *but without prejudice to mesne incumbrances*. *Tunstall* v. *Trappes*, 3 Sim. 300; ante, Vol. 5, pp. 43, 437. The judgment, not being a contract for a charge upon the specific lands, could not include a contract for the benefit of tacking against those lands. Contra of a mortgage. *Titley* v. *Davies*, 2 You. & C. C. C. 399, n., infra, p. 129.]

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In what cases the rule is priority, and in what contribution.

ral creditors under a bankruptcy, 3 Ves. 388, *Baldwin* v. *Belcher*, 3 Dru. & W. 173) does not belong to the same class with liens upon specific property by express contract, and is not subject to the same rules. The rule as to express charges upon the same property is this: that if both parties are equally innocent as to notice, &c., their claims shall not be administered rateably, but the charge which is prior in point of date shall be satisfied, to the utter exclusion, if necessary, of the others. If the second incumbrancer took with notice, his claim to participation is still more out of the question; and in cases where equity requires an incumbrancer to take certain precautions for the protection of subsequent dealers with the property, if those precautions are not taken, the order of priority is reversed in favour of innocent parties. In every case the result is priority, not contribution. In the administration of property which is not the subject of specific charges, the principle is altogether different; there the Court allows of contribution, and never suffers priority of title to confer a right to priority of relief *. Priority in such cases is given to classes, not individuals. Thus legatees, as a class, are preferred to the heir and next of kin; devisees, as a class, are, in most cases, preferred to legatees; (ante, Vol. 5, p. 364; *Cornewall* v. *Cornewall*, 12 Sim. 298; *Earl of Clarendon* v. *Barham*, 1 You. & C. C. C. 709; *Mirehouse* v. *Scaife*, 2 Myl. & Cr. 698); creditors, as a class, are preferred to devisees and other volunteers; specialty creditors, as a class, are preferred to creditors by simple contract; and, among specialty creditors, those whose debts are upon record † are preferred to others. With the exception of some cases of specific devisees or legatees, (which are analogous to those of specific incumbrancers, and in which, therefore, the rule is priority, and not contribution), the individuals in each of these classes have no priorities among themselves, but all are satisfied pari passu; and the reason is, that when they acquired the character in respect of which their claims are made, no specific property was appropriated to them; and wherever the claim is for contribution, and not priority, notice is immaterial; and in a question of priority between two classes notice is equally immaterial, for there can be no notice either to or of classes, except in those cases in which the bankrupt acts, or the statute of Elizabeth, have created a Par-

Notice immaterial where the rule is contribution.

* [Another class of cases in which contribution is allowed is where the parties claim under the *same conveyance*, as where a jointress and children claiming under a settlement contribute towards any loss. *Carpenter* v. *Carpenter*, 1 Vern. 440. So, where one of several under-lessees makes a payment to save the entire original lease from forfeiture. *Webber* v. *Smith*, 2 Vern. 103. So, in the case of co-sureties, whether by the same or by different instruments, if it is the same transaction, ante, Vol. 3, p. 295. As to contribution in case of voucher to warranty, see 3 Rep. 14.]

Contribution between parties claiming under the same conveyance.

† [A question may arise, whether, as by the statute of 4 & 5 W. & M. c. 20, s. 3, a judgment not docketted is deprived of priority, and as docketting is now impossible, judgments have not lost their priority. But the conclusion seems to be, that they have not. If the same legislature that has imposed a penalty for the omission to perform a certain act, afterwards declares that that act shall not be done, it must be held that the penalty is abolished.]

Priority of judgment debts in administration of assets.

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liamentary notice. Thus, a specialty creditor is preferred to simple contract creditors of whose existence he had notice; and he has an equal distributive right with other specialty creditors of whose claims he had notice *. The right of marshalling seems, by the decision in *Barnes* v. *Racster*, to be referred to the same category; and that case seems to be an authority for saying that the right of marshalling charges upon specific property, however obtained, is of the same character with the right of a creditor, legatee, &c., to have specific property administered; so that, among several parties contending for the same fund under the doctrine of marshalling, there is no priority in respect of date, no postponement on account of notice. Notice of a right gained through the doctrine of marshalling is not like notice of a right gained by, and being the express object of, a specific contract. See *Shalcross* v. *Dixon*, ante, Vol. 5, p. 493, (in the statement of which case, £22,000 is misprinted for £2200). The doctrine of Lord *Redesdale*, in *Hamilton* v. *Royse*, 2 Sch. & Lef. 327, that "a purchaser takes subject to all equities to which the vendor was subject and of which the purchaser has notice," must be confined, it is apprehended, to direct equities arising out of *contract* express or implied, which was the character of the equity with reference to which the rule was laid down; and, if it is to be taken in all its apparent generality, had been disapproved of by Sir *E. Sugden*, Ll. & G. 263, and is overruled by the decisions in *Shalcross* v. *Dixon*, and *Barnes* v. *Racster*.]

Marshalling: contribution.

Notice.

Grounds of the decision in *Barnes* v. *Racster*.

[It must be observed, however, that this was not the ground on which Sir *J. L. Knight Bruce*, V. C., expressly rested his decision. His Honor said, "The nature and effect of the security of 1800 were, as I conceive, to make No. 32 and Foxhall pari passu, and rateably according to their values, liable to Barnes's two charges. That, I think, would have been the result between the different heirs of Racster had he died intestate and insolvent as to his personal estate, leaving one person his heir as to No. 32 and another person his heir as to Foxhall. At least, the heir of Foxhall could not have claimed more against the heir of No. 32. Taking this to be so, I am unable to see that Hartwright had in or before the year 1804 (when Williams took his security) acquired any right in No. 32 or any equity against Racster to preclude him from dealing with it on that footing for any purpose that his necessities

Tacking a judgment and a bond.

* [The distinction is well illustrated by the established rules as to tacking a bond debt and a judgment respectively. A mortgagee may tack a subsequent debt by judgment confessed or otherwise, in his own action, because the judgment, being a lien upon land, is regarded as equivalent to a contract to charge the land included in the mortgage; and he cannot tack a bond debt during the debtor's life, because the bond is no lien upon his land. He may tack the bond debt, after the debtor's death, against his heir or devisee, not because of any implied contract, but to avoid circuity of action; his claim in respect of the bond being paramount to that of the heir or devisee: he cannot even then tack the bond debt against creditors, because his claim against the land, through the bond, is, like theirs, merely to a general remedy, and not to a specific charge, so that he can only come in with them pari passu. Ante, Vol. 5, pp. 439, 440.]

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Marshalling: contribution.

might require. *Contract, certainly as to No.* 32, *Hartwright had none. It was to him an accident, a matter with which he had neither privity nor concern, that Racster happened in* 1800 *to mortgage No.* 32 *to Barnes.* Could not Barnes and Racster at any time after 1800, as against Hartwright, have sold or mortgaged No. 32 separately to a stranger, though with notice, leaving Foxhall charged as it was in 1795, and leaving Hartwright in the same situation as if the security of 1800 had never existed? If Barnes and Racster could have done this as against Hartwright, why should not Racster be able as against Hartwright to do so? In my opinion *it would be more than justice to him, and less than justice to Racster, to hold that the security of* 1800 *rendered No.* 32 *to any degree or in any respect less available for the necessities of Racster than the rights of Barnes required.* I think that Hartwright had not any equity to prevent Racster from doing what he did, namely, carrying this estate to market, and selling or pledging it as charged only according to the tenor of the security of 1800, that is, rateably and pari passu with Foxhall. Again, suppose judgments to have been recovered by strangers in 1794, 1799, and 1801 against Racster, who was, I believe, previously to 1800, seised equitably and not otherwise of No. 32; suppose the security of 1800 good against all these judgments, what would have been the relative rights of Hartwright and the several judgment-creditors (with or without elegits) as to No. 32? Can Williams be in a worse situation than that in which he would have stood if his security had consisted of a judgment only instead of what it did? If it were conceded in the present case, that, had Williams's charge not existed, the right claimed by Hartwright could not be enforced against Racster, it does not, in my judgment, follow, that in 1804 (in the absence at the time of any suit or proceeding for applying the property in question, or otherwise relating to it) any such right had arisen. The position of Williams, who took his security with notice, has been in argument assimilated to that of the heir of Racster, or of a person claiming merely as a volunteer under him. To this comparison, I am not prepared to agree. To render it just, it ought to be established either that, eo instanti when Barnes took his second security, Hartwright acquired a lien on No. 32, or that it was inequitable in Racster, however much in need of money, and however fair his intentions, to use No. 32 as part of his property, unless by the consent of Hartwright, or on the condition of paying him his whole debt. I am of opinion that neither proposition can be established, and that Hartwright's title, if any, against No. 32 does not extend beyond such interest in it as before the institution of these proceedings Racster did not alienate for value, *holding, as I do, the notice to be as immaterial as notice to a purchaser of a judgment recovered against a vendor, when the latter, having a power, and being seised in fee subject to the power, can make a title and alienate the fee by an exercise of that power destroying the creditor's security.*"]

As to marshalling different charges upon the same property.

[In *Barnes* v. *Racster* the puisne incumbrancers claimed to marshal the *same* paramount charge upon the common fund. It may be inquired whether the decision would have been the same if they had sought to throw distinct charges upon the common fund; if, for instance, there had been a mortgage of Blackacre to A., a second mortgage of Black-

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acre to B., then a mortgage of Whiteacre to A., a mortgage of Greenacre and Whiteacre to C., and a second mortgage of Greenacre to D., with notice of the three mortgages to A. and B., and of the mortgage to C. The principle of the above case seems to require that the demands of A. should be thrown rateably on the two estates subjected to them, and that the like should be done with respect to C.'s demand.]

Marshalling: contribution.

Distinction as to notice where incumbrancer impliedly contracts for right to marshal.

[Another question, which his Honor expressly left open, was, whether, if Foxhall and No. 32 had been first mortgaged to Barnes, and then Hartwright had taken his security on Foxhall, the decision would have been the same. It is submitted, that it would not. In that case Hartwright would have contracted for as good a security upon Foxhall as Racster could give him, subject to the prior charge upon it together with other property belonging to Racster, upon which other property Hartwright would expect the charge to be thrown in exoneration of himself. In that case he would take the right to marshal, not as an accidental and unanticipated benefit, but as a right which he had distinctly contemplated and impliedly contracted for; his right would then in effect have been founded on a contract to charge Barnes's security upon No. 32 exclusively, which contract would be implied from the circumstances, as a contract to give a security on land is implied from the circumstance of a deposit of deeds. If, on the other hand, in *Barnes* v. *Racster*, there had been no notice to Hartwright of the prior charge upon No. 32, there the case would have been the same as that which actually arose; his right to marshal, not having flowed from contract express or implied, would have been a right not superior in degree to that of his successor with or without notice.]

Averall v. *Wade.*

Contribution to paramount charge.

[The case of *Averall* v. *Wade*, Lloyd & G. Cas. Tem. Sugd. 253, in which, however, the exact point did not arise, may be thought to support what has been advanced above. There the owner of several estates, being indebted by judgment, settled one of the estates, in consideration of the marriage of his son, *with a covenant against judgments and other incumbrances*, and afterwards acknowledged other judgments. Sir *E. B. Sugden*, C., held, that the parties claiming under the settlement were entitled as against the puisne judgment creditors to have the prior judgments marshalled exclusively upon the unsettled estates. The distinction between this case and the case put above is, that here there does not appear to have been notice, but there was an express contract. In *Hamilton* v. *Royse*, 2 Sch. & Lef. 315, however, the very point appears to have arisen; there was notice of the paramount charge, there was not an express contract. The substance of the case was, that, Whiteacre being settled upon A. for life, remainder to his first son in tail, and Blackacre being vested in A. in fee, A. confessed judgments, and then, in consideration of Whiteacre being unsettled and limited to himself in fee, settled Blackacre. The parties to the settlement had notice of the judgments, and the conclusion to be drawn from the report is, that there was no express contract to exonerate Blackacre from the incumbrances. Certainly the judgment does not proceed on the ground of express contract. Lord *Redesdale* held, that a purchaser of Whiteacre, taking with notice of the settlement, was bound by the equity which existed in favour of those claiming Blackacre under it to have the charges thrown exclu-

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sively on Blackacre. This decision may be reconciled with the observations of Sir *E. Sugden*, in *Averall* v. *Wade*, and the decision of Lord *Langdale*, in *Shalcross* v. *Dixon*, by inferring that the equity in question was an equity specifically, though not in terms put impliedly, bargained for. A decision of Lord *Hardwicke*, in a case of *Harvey* v. *Ashley*, 2 Sch. & Lef. 328, and the doctrine of Lord *Plunkett*, in *Hartley* v. *O'Flaherty*, (Ll. & G. Cas. Tem. Plunk. 208, reversing part of the decree of Sir *A. Hart*, in the same case, 1 Beatt. 61; vide ante, Vol. 5, p. 61; Ll. & G. Cas. Tem. Sugd. 261), whether rightly applied to the particular circumstances or not, are to the same effect.]

Contribution to paramount charge.

[If what is said above be correct, the recent case of *Aldridge* v. *Westbrook*, 5 Beav. 138, was not rightly decided. A., being entitled to one moiety of an estate by marriage articles, covenanted to settle it on himself for life, with remainder to his intended wife and children, thus creating an express equitable title to that moiety free from incumbrances. Having subsequently acquired the other moiety, he mortgaged the entirety to B. without notice of the settlement. B. by his will gave the mortgage to C. for life, with remainder to A. absolutely. A. died, and C. having received the rents of the entirety to the disappointment of the widow and children, it was held that the latter had no equity to satisfaction out of the second moiety of the estate, as against the other specialty creditors of A., but must come in with them under the covenant pari passu. The writer is unable to see how the widow and children could be regarded as being in any other situation than that of possessing a specific and paramount equity against the estate claimed by the creditors. Had the settlement been made with notice of a prior mortgage on the settled moiety, and that moiety been subsequently included with the other in a new mortgage, there would of course have been no right of marshalling in competition with the other specialty creditors. *Tunstall* v. *Trappes*, 3 Sim. 286.

Aldridge v. *Westbrook.*

[The case of *Hartley* v. *O'Flaherty* suggests a point upon which the authorities are neither numerous nor satisfactory. If the owner of Blackacre and Whiteacre confesses a judgment, and afterwards sells or mortgages Blackacre to A., whether with or without notice of the judgment, appears to be immaterial, A., according to what has been said, acquires by implied *contract* a *charge*, by way of indemnity, through the judgment creditor, upon Whiteacre, and upon all the other lands which are subject to the judgment, whether he knows of the existence of such lands or not. If the debtor then sell Whiteacre to B., without notice of the judgment, and therefore without notice of A.'s rights, B. acquires, by implied contract, an equitable right to protect himself from the judgment by getting in a term, or by any other means, regardless of the consequences to the judgment creditor, or to third persons. He acquires, in short, an equitable right against any other estate on which he may be able to throw the judgment at law, of the same degree as a charge upon such estate. In any contest between him and A., their equities are of the same degree. So that, if B. has the legal estate, A. shall not have the assistance of equity against him; but if B. goes into a court of equity for relief, he shall first wait till A. is satisfied*. This

As to marshalling a judgment.

* [There is a case, in a book of little authority, in which it is said,

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was the state of facts in *Hartley* v. *O'Flaherty*. A mortgagee of part of an estate which was subject to crown debts, and against which, while in his hands, crown process had been enforced, (*by proceedings in equity*), was held not entitled to relief, by way of contribution or otherwise, from the parties claiming other estates under a settlement on marriage executed prior to the mortgage. The lands on which the extent was levied had been purchased by the crown debtor *after* the date of the settlement; but that circumstance, if what is said above be correct, was immaterial, whether the settlement was made with notice of the liability to the crown or not; because, as has been said, a judgment being a general lien, a purchaser who has notice of it must be understood to rely on the equity which he will have to throw the judgment on the remaining lands of the debtor; but in *Barnes* v. *Racster*, the mortgage of which the second mortgagee had notice was confined to the estate which constituted his own security, so that he could have no expectation of any equity against another estate. In *Hartley* v. *O'Flaherty*, the mortgagee appears to have had no notice of the debts to the crown, (although in some of his remarks Lord *Plunkett* seems to have forgotten that circumstance, see Ll. & G., p. 216); so that his equity was of the same degree as the equity of those claiming under settlement. Now, if an extent at law had been levied on the land belonging to the objects of the settlement, Lord *Plunkett* seems to have thought that they should have had relief against the mortgagee. But this may be questioned. The equities of the parties were the same, and the fact that the mortgagee had escaped the burthen at law was an accidental benefit, similar to that of getting in the legal estate, of which equity would not deprive him. If the paramount incumbrancer is obliged to come into equity to enforce his security, or chooses to do so, equity must bring all parties before it, (see *Bishop of Winchester* v. *Beaver*, 3 Ves. 314, *Rolleston* v. *Morton*, 1 Dru. & W. 171), and then, finding two specific and adverse equities, will, of course, throw the entire burthen upon that which was

Contribution to paramount rent-charge.

if a man grant a rent-charge out of "all his lands," and afterwards sell them by parcels to different persons, and the grantee of the rent-charge resort to one only of the purchasers, the latter shall have contribution from the other purchasers. Cary, 3. This, it is conceived, would not be so, except, of course, in the very improbable case of sales of specific portions expressly subject to an apportioned part of the rent-charge. If the case were put of a rent-charge out of Blackacre and Whiteacre; then a sale of Whiteacre to A., with notice of the charge, and an express or implied contract of indemnity; and then a sale of Blackacre to B., with notice of the charge, but not of the sale to B.; the conclusion seems to be, that A. should be exonerated by B. if both came into equity, but B. might, by getting in a legal estate prior to the rent-charge, or by taking a grant of the rent-charge to a trustee for himself, throw all upon B.; while again, if the owner of the rent-charge enforced payment from A. or B. unequally, neither would have any remedy against the other. *Titley* v. *Davies*, 2 You. & C. C. C. 349, n., is an authority for this, where the paramount charge is a mortgage, and there appears to be nothing in the nature of a rent-charge to vary the principle.]

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last created. But it is conceived that where two persons obtain two properties, which are subject to one paramount charge, with such specific equities to be exonerated as are supposed above, and the paramount charge is made available without the intervention of equity, it will depend (as in the case of getting in the legal estate from a mortgagee, *Peacock* v. *Burt*, ante, Vol. 5, p. 447) upon the choice or caprice of the owner of such charge which of the two shall bear the loss, or whether and in what proportions the burthen shall be divided between them.]

Contribution to paramount charge.

[I have discussed the case of *Hartley* v. *O'Flaherty* without reference to the right of a purchaser of part of the lands to enforce contribution from purchasers of other parts of the land, in the case of an elegit, at the common law, or, in that of an extent, under the stat. 33 Hen. 8, c. 39, s. 80, ante, Vol. 5, p. 65. If upon an extent the purchaser of part paid the debt, he had no remedy at law for contribution against the purchaser of the other parts, whatever remedy he might have had against the debtor and his heirs; but if he chose, by audita querela or scire facias, to object to the extent that it did not include all the lands of the debtor, he might then oblige the creditor to extend all the lands [quære, if in different counties?], and so obtain contribution from the other purchasers. *Harbert's case*, 3 Rep. 12. This objection to an extent, and the process for obtaining contribution were taken away in the case of judgments, statutes, and recognizances, by the stat. 16 & 17 Car. 2, c. 5, (and see 22 & 23 Car. 2, c. 2), ante, Vol. 5, p. 61; but with an express saving to the party whose lands shall be extended of his "*remedy* for contribution against the persons whose lands shall be omitted." The legal right is, therefore, recognized and preserved; but no one seems to understand how it is to be vindicated at law, either in the case of an extent by a subject, or in cases of crown process within the stat. 33 Hen. 8, c. 39, s. 80. See Ll. & G. Cas. Tem. Plunk. 212. Assuming the right to exist at law, it is still a question whether equity will follow the law, or, as in many other cases, act upon its own rules as to priority.]

Contribution at law in case of a partial consent.

[When the paramount charge is a mortgage, this difficulty does not occur, and it has been decided that where Blackacre, Whiteacre, and Greenacre, were mortgaged to A., then Whiteacre mortgaged to B., then Blackacre sold to C. without notice of A.'s security, and then Greenacre mortgaged to D. without notice of B.'s security; B. was entitled to redeem A. as to all, and having done so, might tack his own debt to Blackacre and Greenacre against C. and D.; and *the case was distinguished from that where B. was a judgment or elegit creditor. Titley* v. *Davies*, 2 You. & C. C. C. 399, n. In that case Lord *Hardwicke* said that D., having redeemed B. as to all, could not tack his own debt to Blackacre against C., for at the time of the mortgage to D., the mortgagor had sold all his right in Blackacre to C. See further as to tacking, *Thorneycroft* v. *Crockett*, 7 Jurist, 712.]

Titley v. *Davies.* Contribution to mortgage.

[Let us now consider the case, where Blackacre and Whiteacre, being both subject to a judgment, are sold successively to A. and B., and B. has notice of the judgment; it being still immaterial whether A. has notice or not. If B. has also notice of the sale to A., of course he has notice of A.'s specific equity, (*Hamilton* v. *Royse*, supra), and cannot compete with him. If B. has not notice of the sale to A., the case appears

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to stand thus:—A. has acquired a specific equity to throw the charge upon Whiteacre, not, it may be, by express stipulation that Whiteacre by name shall bear the burthen, but by express or implied stipulation that the debtor shall by his other lands exonerate Blackacre. B. takes Whiteacre with a similar stipulation express or implied; but by this time Blackacre has ceased to come within the description of lands belonging to the debtor, and therefore does not come within the scope of the stipulation with B. Consequently B. cannot, by getting in the judgment or a prior legal estate, throw the charge upon A. If the debtor, without giving notice of A.'s title, had expressly represented to B. that he would have an equity against Blackacre, and B. could bring such representation in evidence consistently with the Statute of Frauds, (see Gilb. For. Rom. 232, ante, Vol. 1, pp. 302, 331, 356), that would, of course, create a specific equity against Blackacre.]

Whitworth v. *Gaugain.*

Lien by judgment.

[The discussion has thus conducted us to the much debated case of *Whitworth* v. *Gaugain* (reported on the motion before Lord *Cottenham*, in Cr. & Ph. 325, more fully in 5 Jurist, 523). In that case the plaintiffs had taken a deposit of the title deeds relating to certain estates, as security for a past debt, a new advance, and future advances. The bill was filed for a sale of the mortgaged property, and to deprive creditors under judgments by default, signed subsequently to the deposit, of the benefit of elegits which they had sued out upon those judgments against lands included in the security to the plaintiffs. The original bill charged that the judgments had been obtained by collusion, with a fraudulent intention, and with notice of the plaintiffs' rights; but that case not being established, Lord *Cottenham*, C., held that the plaintiffs were precluded by the frame of the bill from insisting on the general equity which they asserted to exist independently of any notice or fraud. On this point his Lordship said,—"If the bill had been framed for that purpose, and the claim of the plaintiffs founded on that supposed equity, I should have required a great deal more to satisfy me of the validity of that equity before I could interpose by interlocutory order; because I find these defendants in possession of a legal title, although not to all intents and purposes an estate, yet a right and interest in the land which, under the authority of an act of Parliament, they had a right to hold, the elegit being the creature of an act of Parliament; and therefore they had a parliamentary title to hold the land as against all persons, unless a case of equity should be made to induce this court to interfere. I was a good deal struck at the time it was quoted with that case in the Exchequer, decided by a high authority, and evidently after very considerable pains taken to ascertain the state of the law on that subject. I mean the case of *Casberd* v. *The Attorney-General*, (6 Price, 411, Dan. 238), decided by Chief Baron *Richards*, and I was very much relieved when I read that case, because I observe the Chief Baron puts it entirely upon this—that it was a contest between two equities; that there was no debt of record due to the crown, and therefore it was no contest between a legal title and an equitable claim, but between two equities, and therefore, as between two equities, the prior equity was of course to be preferred. When the case comes to be examined, it is not only not an authority for the argument contended for, but it seems, if there had been a legal title against which the claim of

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the equitable mortgagee was contended, that that legal title would have prevailed; and if Mr. Richards looks into that case, he will see (whether the Lord Chief Baron is right or wrong, with regard to the extent, is not at all material for the present purpose) that it seems to have been his great difficulty how far the circumstances of the case constituting the claim of the crown gave the crown the benefit which the crown claimed to be entitled to; or whether it was not a mere simple contract debt, which the crown was entitled to, but which did not give the crown the benefit as against the parties contesting,—did not give the crown the same right as it would have given if there had been a debt of record. The Lord Chief Baron puts it very distinctly on that ground, being of opinion that the crown had no such right when the debt was not of record; and, being of opinion it was a contest between two equities, he decided in favour of the prior equity. I am glad to find that, because I should have had great difficulty, if the transaction had been otherwise, in understanding upon what ground the court proceeded; but, *assuming the court to have been right in that view of the nature of the debt due to the crown*, it does not in the least operate on the question now before the court*."]

[Upon an amended bill, waiving the charges of notice and fraud, and raising the general question, Sir *J. Wigram*, V. C., decided in favour of the equity claimed by the plaintiffs. In *Langton* v. *Horton*, 1 Hare, 561, his Honor had already said, that he did not construe the observations of Lord Cottenham as importing an opinion against that equity; and, at the conclusion of the argument in the present case, he said—"If I thought that Lord Cottenham meant to state a positive opinion on this question, in the words which are attributed to him, I certainly would not decide the other way; but as I understand Lord Cottenham's words, he merely meant to say, that this might be a question, and that he

* [See some observations on the case of *Casberd* v. *Attorney-General*, ante, Vol. 5, p. 73. Those observations were written with reference to the report of the case in Price, which is fuller than that in Daniel, but upon examination is found to differ from it in some points, which appear to be most accurately stated in Daniel. There was an outstanding legal term, which was prior to the title of the crown; but that, both upon principle and upon the authority of *Rex* v. *Smith*, (3 Sugd. Vend. App. 36, ante, Vol. 5, p. 71), could not affect the title of the crown, which is a *legal* right to extend estates held upon direct trusts for the debtor. The case cannot be regarded as an authority on either side of the question, because the crown was not relying on its legal title under the extent, which was only available against the rents and profits, but came into a court of equity seeking its assistance in a sale under the stat. 25 Geo. 3, c. 35, which expressly subjects the proceeds of the sale to the order of the court. This was a very different case from that of an incumbrancer who relies on his legal title, and asks no relief of the court, and more resembles that of a mortgagee seeking a sale in bankruptcy, who will not be allowed the benefit of tacking, which he might have insisted on had he remained passive. (*Ex parte Bignold*, 2 Deac. 86). In *Casberd* v. *Attorney-General*, the crown was defendant it is true, but it was defendant in a cause which it had itself subjected to the jurisdiction of the court.]

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would not decide it on an interlocutory application." His Honor then said, that it was quite clear that a judgment creditor without notice would not be allowed to levy execution on an estate, of which, at the date of the judgment, his debtor was seised as a mere trustee. That was unquestionable. *Newlands* v. *Paynter*, (4 My. & Cr. 408), decided by Lord Cottenham himself, was as strong an authority as possible on that point. It had been attempted to distinguish the case of a mortgage by deposit from that of a pure trust. The objections to allowing any interest in the land to pass by a mere deposit of the title-deeds had been frequently urged; but it was now settled, that a mortgagee by deposit of title-deeds was a purchaser for valuable consideration of an interest in land. Nothing had been said to distinguish that case from the case of a mere trust; and his Honor's opinion was, that, as a judgment creditor could not take that interest which a cestui que trust had in the lands of which his trustee was seised, so he could not take that interest which a prior mortgagee by deposit had in the lands of his depositor. March 28, 1844, MS.]

[That Lord Cottenham did intend to express a very strong opinion against the plaintiff's equity was very generally understood in the profession; and the consternation which this dictum excited in the city was entirely occasioned by that understanding. It seems, indeed, very difficult to read his Lordship's observations in any other sense; and, therefore, it is perhaps to be regretted that the Vice-Chancellor, who was not at all bound by any decision of the superior court, should have left his own judgment open to the objection, that it was pronounced without reference to a dictum of an eminent judge, which it overrules. Lord Cottenham's opinion was by no means a novelty. The same view had been propounded, for instance, by Mr. Coote, in his work on Mortgages, (p. 254, 2nd ed.) And see *Rowe* v. *Bant*, Dick. 150.]

Observations on *Whitworth* v. *Gaugain*.

[Lord Cottenham's dictum, so far as it expressed an opinion on the question, we have now the Vice-Chancellor's authority for saying, is inconsistent with principle. All the difficulty appears to have arisen rather from a confused perception of the facts to which the well-known principles of equity were to be applied, than from any misapprehension of the doctrine itself. The doctrine, admitted on both sides, is this: that, where there are two *adverse* equitable claims, that which is prior in point of creation shall be first enforced against the common trustee or stakeholder; but where the stakeholder is himself the puisne equitable claimant, the prior equity shall not be enforced against him. The latter branch of the rule is commonly qualified by confining it to equities which are "equal;" (See *Oxwith* v. *Plummer*, Gilb. Eq. Rep. 13); but this seems to be an inaccurate expression. There can be no gradation between equities, except that which arises from their relative priorities in point of time. Equities may differ in kind, and then they are not comparable together. One equity may be subject to another, and then comparison is out of the question: but where there are two equitable rights to the same kind of relief against the same specific property, either one of them is an equity as it were in remainder after the other, and in strictness not an equity against the same *interest*, (as where it was obtained with notice), or the equities are to all intents equal; and then the Court, not adopting the principle of rateable division, and find-

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ing it necessary to choose between the adverse claimants, gives a preference to the earlier incumbrancer.]

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[The question is thus narrowed to this simple inquiry; has the judgment creditor any equitable right to be satisfied out of the interest which the mortgagee claims a lien upon? The observations that have been already made seem to contain the answer to this inquiry; but the extreme importance of the subject may make it not improper to examine it rather more minutely. For convenience of illustration, let A. denote the first incumbrancer, B. the second; and always suppose B. to have no notice of A.'s rights. If A. is a judgment creditor, and B. an equitable mortgagee, it is admitted that A. has an equity against the specific property which is liable to B.'s equity, and B. has a like equity against the property which A.'s lien covers. Again, if A. and B. are both equitable mortgagees, A. has the same equity as before. Thus it appears that a case may be put, in which it is indifferent whether the incumbrance be a judgment or a mortgage. And it being thus found that a judgment may, under some circumstances, confer the same equity that a deposit or other contract confers, it is concluded by the supporters of Lord Cottenham's dictum that this equity must exist in every case, and against all the lands which are legally bound by the judgment; it is concluded that as, in the case put, it is indifferent whether A.'s lien is by judgment or by contract, so it must be indifferent whether B.'s lien is by judgment or by contract. The answer is, not that in such case B.'s equity under his judgment is lower than, or inferior to, A.'s, but that B. has no equity whatever against the interest which A. claims. To bring the issue to the narrowest compass, suppose the estate to be insufficient to satisfy either claim in full, so that, in effect, either claimant, if the other were out of the way, would take the whole, whether specifically or in a modified or converted state is immaterial. In this case, if B. is a mortgagee by contract, he has an equity against the very property claimed by A.; if B. is a judgment creditor, he has no equity whatever, whether A.'s lien is by judgment or by contract.]

[That this is so must be evident on a moment's consideration. If the party with whom A. and B. dealt was himself but an equitable owner, by the effect of his contract with A., (whether by way of sale, or, being insolvent, by charge beyond the value of the land, is immaterial), he ceased to have any interest in the land; he became as to it an absolute stranger; with that land, a contract to bind, or charge, or sell "all his lands," would have no concern. (See *Coteen* v. *Missing*, 1 Mad. 175: *Titley* v. *Davies*, ante, p. 129). How happens it, in any case, that two conflicting equitable titles to property arise? It can only happen by the *fraud* of the original owner,—by his first disposing of an equitable interest to A., and then disposing of the *same* interest to B. And B. cannot ask the Court to listen to his claim as against A., but upon an allegation, that, if A. prevails, he (B.) will be disappointed of what *he contracted for*. If that which A. claims is something that B. never contracted for, there is no conflict of demand, and B., obtaining at law the dominion over that which A. has purchased, must be held a trustee for him. The only apparent difficulty in applying this view to the case where B. claims by judgment arises from the not always perceiving, that the question whether by the judgment (so far as it can be treated as equivalent to a

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contract) B. expected or contracted for a lien upon the specific property in dispute*, depends upon the previous question, whether or not it had been already disposed of to A. If B. took a mortgage of the estate without notice, and the security is deficient, he contracted for that which he supposed the mortgagor to have, though, in truth, he had it not, namely, the specific interest already disposed of to A., or so much of it as would be necessary to satisfy his own debt. A mortgage is specific. If it includes Blackacre, and nothing is said of incumbrances, it is conclusive that Blackacre was contracted for, though Blackacre may already have been disposed of, wholly or in part, to A. A judgment is general. It would be going too far to say, with some of the authorities, that it does not shew an intent to resort to lands at all; for, as it gives a remedy against lands, the creditor has as good a right to say he had that remedy in view, as to say that he contemplated the security of the debtor's person or goods only, or as a mortgagee who takes a covenant has to say that he meant a security on land; and since the recent act, the registry is conclusive as to the intention to resort to lands, because it is utterly useless for any other purpose; but it shews no intention to resort to *specific* lands. It may shew that the creditor intended to take the debtor's lands if he had any, or if he should afterwards acquire any. It does not shew that he believed or was given to understand that he had any lands; still less does it shew that he believed he had Blackacre, and intended to resort to it, and contracted for a lien upon it. See *Blunden* v. *Desart*, 2 Dru. & W. 418, where Sir *E. Sugden*, C., held, that the lien of an attorney upon papers had not the character of an incumbrance entitled to priority.]

[A voluntary judgment is, of course, the same thing as a contract; but it is a contract only for a lien upon such property as the debtor has at the time, or may afterwards acquire. It is evidence of a contract for Blackacre, if at the time Blackacre was the debtor's, because it is evidence of a contract for all that was the debtor's; but, not being evidence of a contract for anything that was not the debtor's, it is no evidence of a contract for Blackacre, if at the time that was not the debtor's. If at the time of entering up the judgment, or at any time afterwards, and before notice of A.'s security, the debtor informs B. that he is entitled to Blackacre, and that the judgment will cover it, this may be a contract for a specific lien, and, if it is by writing, may convert B. into a mortgagee of the specific property. (See *Hedworth* v. *Primate*, Hard. 318, a case on a statute, where the distinction between a contract for a general lien and a security on particular lands is clearly indicated). If the debtor never makes any such statement, or makes it only by parol, so that it cannot be judicially noticed, (For. Rom. 232; *Ex parte Hooper*, 1 Meriv. 7; 19 Ves. 477, ante, Vol. 5, p. 439. See *Ede* v. *Knowles*, 2 You. & C. C. C. 172), and if B. proceeds to perfect or gain a legal title to Blackacre, —whether by executing his judgment or by getting in a term is imma-

* [By the specific property in dispute is meant, of course, that part or residue of the estate in question which, if B.'s claim does not absorb it, will be taken by A. That part which would remain, after paying A. in full, is not property in dispute for the present purpose.]

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terial,—no equity is created: B. can never say that he was led to expect that he should have a lien on Blackacre, or that he contracted for it.]

Lien after elegit.

[A distinction is taken between a judgment creditor and an elegit creditor; and it is said that the latter shews, from the moment at least of taking possession, that he had the specific lands in view. This is true, but he does not shew, that then, or at any previous time, *he contracted for them.* See *Errington* v. *Howard,* Amb. 485. A creditor of C., getting in from D. a legal term in land belonging to E., could not support his possession by asserting that, although C. never told him so, he thought the land was C.'s, and looked to it as his security. And it can make no difference, that the legal estate happens to be in C., in trust for E.; unless C. has taken advantage of his connexion with the estate to represent it to the creditor as his own, and to obtain some concession from the latter, *in consideration* of giving him a lien *on that estate.*]

[The essence of the equity of a puisne incumbrancer is, that he did contract for something, and that he did not know he was contracting for what belonged to a third person. The claim of the puisne judgment or elegit creditor cannot be so stated as to come within this equity. It must be rested on a contract for every thing that the judgment can reach *at law,* without qualification, for it cannot arise out of a contract merely for every thing within the scope of a judgment that the debtor is *beneficially* entitled to. If it is rested on the former contract, the judgment creditor comes into court asserting that he did contract for the thing in dispute, by the description of a thing not belonging to his debtor. Will it bear to be stated that he has—not an "equal" equity but—any equity whatever under such a contract?]

Breerton v. *Jones.*

Debt by judgment to one who had no prior specific lien upon the estate, cannot be tacked to a prior debt secured by the legal estate, to the prejudice of a mesne incumbrancer.

[This view of the subject is very strongly confirmed by the case of *Breerton* v. *Jones,* before Sir *J. Trevor,* M. R., 1 Eq. Ab. 325, where A. mortgaged his estate to B., and then assigned the equity of redemption to C.; afterwards D. obtained a judgment against A., and B. assigned his mortgage to D., who had notice of the assignment of the equity of redemption upon his purchasing in the mortgage; (as to this, see *Peacock* v. *Burt,* ante, Vol. 5, pp. 447, 449); and, *C. coming to redeem,* it was objected that, D. having the legal estate in him by the assignment of the forfeited mortgage, and C. having only an equitable interest not supported by the legal estate, if C. would have equity, he ought to do equity by paying off both monies to D. But it was answered and resolved by the Court that C. should redeem, paying only the money due on the mortgage, and not what was due on the judgment; *because the equity of redemption was never bound by the judgment, for the judgment was not confessed so as to become a real lien upon the estate at the time when this equity was assigned;* and, therefore, the judgment could never charge or affect it; and, consequently, C. purchased an estate not bound by the judgment, and, by consequence, the judgment creditor, by purchasing in the prior judgment, could never defeat the interest of C. It was also declared, that, if a person that had a first mortgage should, *without the consent of the mortgagor,* purchase in a subsequent judgment, a mesne mortgagee or assignee of the equity of redemption should not be obliged to pay the money due on both securities in order to redeem, because such transaction of the mortgagee was only to load the estate

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without the consent of the owner, when he had no prospect of bettering his own security. The only difference between this case and that of *Whitworth* v. *Gaugain* is, that in the latter the legal estate was got in by the creditor from the debtor himself; but the circumstance that a legal estate is outstanding cannot affect the original equity of either party. See, too, *Tunstall* v. *Trappes*, 3 Sim. 300, ante, Vol. 5, pp. 43, 437, a decision to the same effect; and *Lodge* v. *Lyseley*, 4 Sim. 70, ante, Vol. 5, pp. 47, 48.]

[On the specific point, whether equity will deprive the creditor of the benefit of his legal powers, there appear to be at the most but three direct decisions prior to *Whitworth* v. *Gaugain;* namely, *Turner* v. *Richmond*, 2 Vern. 81, a decision by Lord Jeffreys in favour of the judgment creditor, and of little authority; a decision by Lord *Cottenham* himself against the judgment creditor, in a case in which the point arose (but was not mentioned) between a direct trustee of personal chattels and a creditor who had levied execution by fieri facias; (*Newlands* v. *Paynter*, 4 My. & C. 408); and a decision in favour of the judgment creditor by the Vice-Chancellor of England, in a case which may be thought to have raised the very point, but which, as his Honor expressly held that it did not raise the point, it is unnecessary to examine. *Perkins* v. *Pritchard*, 3 Railw. Cas. 95; 8 Jur. 29.]

Illustrations of the rules as to priority.

[The following examples will, perhaps, place the application of the principles which it has been attempted to establish in a clearer light:—

1. A bare trustee of Blackacre for A. mortgages or sells to B., who has no notice, and B. subsequently, with or without notice, gets in the legal estate:—Or, such trustee confesses a judgment to B., and, by writing at the time, tells him that the judgment will give him a lien on Blackacre, or tells him so by writing subsequently, and as an inducement to forbearance; and after this B. acquires notice, and perfects or gets in, or has already got in, a legal title:—Or a person who, by possession under a forged document or otherwise, appears to be beneficially entitled to Blackacre, in which he has no interest legal or equitable, and which belongs in equity to A., sells or mortgages to B., and B., before or after notice, gets in the legal estate. (*Jones* v. *Powles*, 3 My. & K. 581; ante, Vol. 5, p. 450). In none of these cases shall B.'s legal title be interfered with.

2. A trustee of Blackacre for A. confesses a judgment to B., or, which is the same thing, makes a sale, mortgage, or settlement of lands, by the general description of "all his lands, tenements, and hereditaments;" (as in the ordinary conveyance in trust for creditors); or, of "all his lands, tenements, and hereditaments in which he has a beneficial interest;" or, of "all the lands, tenements, and hereditaments in which he has any estate or interest at law and in equity, or at law and not in equity:"—or, the owner of Blackacre confesses a judgment to A., or makes a sale, mortgage, or settlement in A.'s favour of his lands by such a general description as above, and then the same person confesses a judgment or makes such an indefinite sale, &c. to B. In none of these cases shall B. avail himself against A. of any legal power or estate acquired either before or after notice.]

Williams v. *Owens.*

[The case of *Williams* v. *Owens*, 7 Jur. 1145, is not law, if the fore-

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Equity of surety for mortgagor held to be bound by a further advance made without his knowledge.

going observations are not altogether founded in error. A mortgage was made for £300, and three persons joined as sureties in the covenant to pay. The mortgagee subsequently, and without the knowledge of the sureties, advanced £100 more to the mortgagor by way of further charge. He then obliged the sureties to pay the £300. It was held that his second charge of £100 stood in priority to their equity; and that they could not stand in his place as against the mortgagor, until they had also paid the £100. A rule so monstrously unjust as this cannot be part of the doctrines of equity. Sir *L. Shadwell*, V. C., observed that the equity of redemption was not reserved to the sureties, but to the mortgagor. There was no restraint against lending a further sum. If the transaction had stood simply upon the mortgage deed, then the plaintiffs would have had the equity asked. The rule of equity was this: that the surety had a right to stand in the place of the mortgagees, but then as such there was the right to make the further advance*. *Copis* v. *Middleton*, Turn. R. 224, was the only case cited in the argument, and it was cited on the plaintiffs' side. Lord *Eldon* was there of opinion that the surety, having paid off the bond in which he had joined with the principal, could not call for an assignment of it, because the bond was discharged and useless. As the cases at law have settled that the surety may bring indebitatus assumpsit on the implied contract of indemnity or case, (ante, Vol. 3, p. 292), it is too late to contend against this doctrine; otherwise the correct conclusion would seem to be, that, as the implied liability of the principal arises out of a deed poll to which he is a party, the action should be covenant, and not simple assumpsit. See *Burnett* v. *Lynch*, 5 Barn. & Cr. 589, infra, p. 175. The surety had a clear specific equity by implied contract to resort to the mortgaged property; (*Stokes* v. *Clendon*, 3 Swanst. 150); and the mortgagee, having notice of this, could not, according to all the authorities, tack a subsequent debt to the prejudice of this right. If he could, then, by the advance, he materially altered the situation of the sureties, and thereby discharged them; so that, quâcunque viâ datâ, the plaintiffs were entitled to their remedy. Vide ante, Vol. 3, p. 291, et seq., and the cases cited in the able note of the learned reporter (Mr. T. Edwards), 7 Jur. 1146; *Beckett* v. *Booth*, 2 Eq. Ab. 595.]

* [And also the right to withhold any advance: if the sureties stood in the mortgagor's place, they excluded him from it.]

14. ASSIGNMENT-MENT OF SATISFIED TERM TO ATTEND.

14. ASSIGNMENT *by one of several Executors, of a satisfied* TERM *created in a Marriage settlement, In Trust for a* PURCHASER *of part of the Premises, and to* ATTEND *the* INHERITANCE, *where the Conveyance of the Fee is not Contemporaneous.*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*assignor*], of &c., of the first part; [*vendor*], of &c., of the second part; [*purchaser*], of &c., of the third part; and [*trustee*], of &c., of the fourth part. WHEREAS, by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, the indenture of release being expressed to be made between &c.; (being a settlement made on a marriage then intended, and which was afterwards solemnized between the said [A. B.] and [E. F.]); the —— and hereditaments hereinafter described, and intended to be hereby assigned, with their appurtenances, were conveyed and assured, (subject to and in expectancy upon certain uses in the same indenture mentioned, and which are since determined, or have failed of effect), *To the use* of the said [G. H.] and [I. K.], their executors, administrators, and assigns, for and during the term of 1000 years, without impeachment of waste, upon divers trusts declared of the same term, and which have long since been performed, satisfied, or discharged. AND WHEREAS the said [G. H.] survived the said [I. K.], and, by his last will and testament in writing, bearing date on or about the —— day of ——, appointed his son, the said [*assignor*], and certain other persons (*a*), exe-

Recital of settlement creating term.

—Will of surviving trustee.

Expediency of making all the executors parties.

(*a*) One of several executors is competent to assent to a legacy, (vide ante, Vol. 3, p. 3), or to make to a purchaser an effectual assignment of a leasehold estate; but it is usual to require the concurrence of all, in order to guard against the possible event of a sale having been made by any other executor, who of course has, and may have exercised, the same power of alienation over the term which is possessed by his coadjutor or coadjutors, and that the purchaser may have the benefit of a covenant from *all* the executors that they have not incumbered. This consideration, of course, has more weight where the testator was beneficial owner, than where he had only a dry legal estate; in the latter case, an assignment by one of several executors is sometimes taken for the sake of convenience. It has been decided that a purchaser cannot object to the suffi-

14. ASSIGNMENT OF SATISFIED TERM TO ATTEND.

cutors thereof; AND WHEREAS the said will of the said [*testator*] was duly proved by the said [*assignor*] and the said other executors thereof in the Prerogative Court of the Archbishop of Canterbury, on or about the —— day of ——; —Probate.

AND WHEREAS, under or by virtue of divers mesne conveyances and other acts and assurances in the law (*b*), and ultimately, by an indenture of release (*c*), bearing date the —— day of ——, and expressed to be made between &c., and duly acknowledged by the said —— (*a party, being a married woman*), part of the hereditaments comprised in the said term of 1000 years, that is to say, ALL THAT (*here describe the parcels fully*); And all profits, commodities, advantages, and appurtenances whatsoever to the said hereditaments belonging, or in anywise appertaining, have become conveyed and assured to such uses as the said [*purchaser*] should appoint, in manner and by the means in the indenture of release now being recited mentioned; and in default of such appointment, and in the mean time subject thereto, *To the use* of the said [*purchaser*] and his assigns, during his life, with remainder *To the use* of the said [*dower trustee*] and his heirs, for the life of the said [*purchaser*], *In trust* for him and his assigns, with remainder to the use of the said [*purchaser*], his heirs and assigns, for ever. AND WHEREAS, on the application and at the request of the said [*vendor*] and [*purchaser*], the said [*assignor*] hath agreed to assign the said —— and hereditaments conveyed by the hereinbefore recited indentures of lease and release, or so much or such part or parts thereof as is or are comprised in the said term of 1000 years, unto the said [*trustee*], In trust for the said [*purchaser*], his

—The last conveyance of the fee in part of the premises comprised in the term.

Recital of uses to prevent dower.

—Agreement to assign the term.

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ciency of an assignment, on the ground that several executors were made parties, but one only executed. *Simpson* v. *Gutteridge*, 1 Madd. 609.

(*b*) It is usual to recite all the assurances affecting the fee since the creation or last assignment of the term, but where they are numerous, particularly if the property be small, this plan may be properly relinquished. The assigning trustee, indeed, may and ought to require the title to the fee to be deduced, for the period over which his trusteeship extends, and perhaps in strictness may insist on its being recited; but under such circumstances he may properly dispense with the recital.

Reciting title to the fee in assignment of term.

(*c*) [This recital applies to a conveyance by release alone, under the recent act; but it might be used with equal correctness in referring to a conveyance by release founded on an actual lease for a year. The material statement is as to what was done by the release, and the fact that it was done by means of a lease for a year is quite unimportant; the recital that it was done implies that it was done effectually.]

Recital of release.

14. ASSIGNMENT OF SATISFIED TERM TO ATTEND.

heirs, appointees, and assigns; and to attend the inheritance of the same premises, in manner hereinafter mentioned.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, and of 10*s.* sterling to the said [*assignor*] already paid by the said [*trustee*], he the said [*assignor*], on the nomination of the said [*purchaser*], and by the direction of the said [*vendor*], testified by their severally executing these presents, and by way of assignment or other assurance only, and not by way of covenant or warranty, by these presents *Doth* bargain, sell, assign, transfer, and set over unto the said [*trustee*], his executors, administrators, and assigns, ALL THOSE the said —— and hereditaments which are mentioned or comprised in the hereinbefore in part recited indenture of release, bearing date on or about the —— day of ——, and which are, or are expressed and intended to be, thereby assured, to the uses hereinbefore mentioned or referred to, or all such and so many and such parts of the same —— and hereditaments, as are comprised in and subject to the said term of 1000 years, or the unexpired residue thereof, with their and every of their rights, members, and appurtenances; And all the estate, right, title, interest, trust, term and terms for years, property, possession, benefit, claim and demand whatsoever, at law and in equity, or otherwise howsoever, of him the said [*assignor*] in, to, and upon the said —— and hereditaments intended to be hereby assigned, with their appurtenances; TO HAVE AND TO HOLD the said hereditaments, and all and singular other the premises intended to be hereby assigned, with their and every of their appurtenances, unto the said [*trustee*], his executors, administrators, and assigns, henceforth, for all the residue now unexpired of the said term of 1000 years, and for all other the estate, term, and interest of the said [*assignor*], as such executor as aforesaid therein; IN TRUST, nevertheless, for the said [*purchaser*], his appointees, heirs, and assigns, according to the uses and trusts which have been declared for his and their benefit as aforesaid, and to be assigned and disposed of from time to time as he or they shall direct and appoint; and, in the mean time, to attend, wait upon, and go along with the freehold, reversion, and inheritance of the said hereditaments and premises intended to be hereby assigned; *To the end* that the same freehold, reversion, and inheritance, may, by means of the said term, be protected from and against all

Vendor's trustee assigns to purchaser's trustee.

Parcels.

All the estate, &c.

Habendum;

In trust for purchaser, and to attend the inheritance.

incumbrances (if any such there be) mesne and subsequent to the creation of the same term; and upon or for no other trust, intent, or purpose whatsoever. (*Covenant by assignor with trustee, that he has not incumbered, ut ante, p.* 106). In WITNESS &c.

14. ASSIGNMENT OF SATISFIED TERM TO ATTEND.

15. ASSIGNMENT *of a* TERM *to attend the Inheritance, by a* SEPARATE DEED, *where the Purchase-money is* PAID *to the* MORTGAGEE *of the* TERM (*a*). (*Variations where Part only of the Purchase-money is paid to the Mortgagee. Also, where Part only of the Property comprised in the Term is conveyed to the Purchaser*).

15. ASSIGNMENT BY MORTGAGEE OF TERM TO ATTEND.

THIS INDENTURE, made the —— day of ——, BETWEEN [*mortgagee*], of &c., of the first part; [*vendor,*] of &c., of the second part; [*purchaser*], of &c., of the third part; and [*purchaser's trustee*], of &c., of the fourth part; WHEREAS, by an indenture of demise by way of mortgage, bearing date on or about the —— day of ——, and made between the said [*vendor*], of the one part; and the said [*mortgagee*], of the other part; the said [*vendor*] did demise unto the said [*mortgagee*], his executors, administrators, and assigns (*b*), ALL THAT (*describe parcels*), *To hold* the same

Parties.

Recital of deed creating the mortgage term.

(*a*) This precedent exemplifies the mode by which (according to a suggestion in a former note, ante, p. 106,) a term vested in a mortgagee, who is paid off out of purchase-money, is assigned by a separate deed. The deed of assignment in such a case explains the real nature of the transaction, which is not quite accurately represented on the face of the conveyance of the fee. If the purchaser be himself the mortgagee, the form of the draft will not be much altered, the principal variation being, that the mortgage-money will be described as *retained by*, instead of being *paid* to him, but the conveyance of the fee ought in this instance to be treated as *posterior* to that of the term, since, if the freehold vest in him previously to his assignment of the term, the latter will have become merged by their union in the purchaser; indeed, in order to secure the priority of the assignment of the term, and thereby prevent the possibility of merger, it seems better to date the release a day later than the assignment, of course varying the recitals accordingly. [As to the expediency of keeping the mortgage *debt* on foot, vide infra, p. 209.]

Remarks upon the precedent in the text.

(*b*) If the property purchased comprise part only of that included in the term, say—

"(among other hereditaments) ALL THAT (*describe parcels as in the deed of release*)."

15. ASSIGNMENT BY MORTGAGEE OF TERM TO ATTEND.

unto the said [*mortgagee*], his executors, administrators, and assigns, for the term of 500 years thence next ensuing, subject to a proviso for redemption on payment by the said [*vendor*], his heirs, executors, administrators, and assigns, unto the said [*mortgagee*], his executors, administrators, or assigns, of the sum of 1200*l.* and interest on a day long since passed. AND WHEREAS the said [*vendor*] lately contracted with the said [*purchaser*] for the absolute sale to him of the said ——, at or for the sum of 1050*l.*; And accordingly, by indenture of release, bearing even date with these presents, and made between &c.; In consideration of the said sum of 1050*l.* therein expressed to be paid by the said [*purchaser*] to the said [*vendor*], the receipt whereof is thereby acknowledged, he the said [*vendor*] did convey and assure unto the said [*purchaser*], his heirs and assigns (*c*), the said —— hereditaments and premises comprised in and demised by the hereinbefore recited indenture of mortgage, with their appurtenances, *To hold* the same unto and to the use of the said [*purchaser*], his heirs and assigns, for ever: AND WHEREAS, upon the treaty of the said purchase, it was agreed (*d*), that the said purchase-money or sum of 1050*l.* should be applied towards the discharge of the said mortgage debt of 1200*l.*, (the interest thereon having been wholly paid and discharged), and that the residue of the said mortgage debt should be paid off and discharged by the said [*vendor*]; And that thereupon the residue of the said term of 500 years, of and in the said purchased premises, should be assigned to a trustee for the said [*purchaser*]. AND

—Contract of sale, and contemporaneous conveyance of the fee.

Agreement for the assignment of the term.

—That pur-

(*c*) If the property purchased comprise part only of that included in the term, say—

Variation where the term comprises other property.

"the hereditaments and premises hereinbefore described, being part of the hereditaments and premises comprised in and demised by the hereinbefore-recited indenture of demise or mortgage."

(*d*) If part only of the purchase-money is paid to the mortgagee, say—

Variations where part only of the purchase-money is paid to the mortgagee.

"that the said sum of £——, part of the said purchase-money, should be applied in satisfaction and discharge of the said principal sum of £—— owing to the said [*mortgagee*] upon the said indenture of mortgage (all interest thereon having been previously paid and discharged), and that thereupon the residue" &c.

15. ASSIGNMENT BY MORTGAGEE OF TERM TO ATTEND.

WHEREAS, in pursuance of the said agreement in that behalf, the said sum of 1050*l.* (*e*) in the said indenture of even date herewith mentioned to have been paid to or on account of the said [*vendor*], was actually paid to the said [*mortgagee*] (*f*), in part satisfaction and discharge of the said mortgage debt of 1200*l.* NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement in this behalf, and in consideration of the said sum of 1050*l.* so paid to the said [*mortgagee*] by the said [*purchaser*], as hereinbefore is mentioned (*g*), And for and in consideration of the sum of 150*l.* of lawful British money, at or immediately before the sealing and delivery of these presents, to the said [*mortgagee*] paid by the said [*vendor*], the receipt of which sums of 1050*l.* and 150*l.*, amounting together to the sum of 1200*l.*, the said [*mortgagee*] doth hereby acknowledge, and of and from the same doth acquit and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, and also the said [*vendor*], his heirs, executors, administrators, and assigns respectively, for ever by these presents, and doth declare the same to be in full satisfaction and discharge of all principal and interest monies due and owing to him on his aforesaid mortgage security, And in consideration of the sum of 10*s.*, to the said [*mortgagee*] paid by the said [*trustee*] at or immediately before the execution of these presents, the receipt whereof is hereby acknowledged, He the said [*mortgagee*], [at the request and by the direction of the said [*vendor*], and on the nomination and appointment of the said [*purchaser*], testified by their severally executing these presents], *doth* hereby bargain, sell, assign, transfer, and set over unto the said [*trustee*], his executors, administrators, and assigns (*h*),

chase-money was paid to mortgagee. *Testatum.*

In consideration of purchase-money, and a further sum to mortgagee, mortgagee assigns to trustee.

(*e*) If part only of the purchase-money is paid to the mortgagee, say—

"part of the said sum of £—— in the said indenture," &c.

(*f*) If part only of the purchase-money is paid to the mortgagee, say—

"in full satisfaction and discharge," &c.

(*g*) If the purchase-money exceeds the mortgage debt, say—

"the receipt of which sum the said [*mortgagee*] doth hereby acknowledge, and doth declare the same to be in full satisfaction," &c.

(*h*) If the property purchased comprise part only of that included in the term, say—

"so much and such and all such part or parts of the ——,

Variation where the term comprises other property.

15. ASSIGNMENT BY MORTGAGEE OF TERM TO ATTEND.

And all the estate, &c.

the said ——, hereditaments, and premises comprised in, and conveyed or expressed to be demised by the hereinbefore-recited indenture of mortgage of the —— day of ——, with the appurtenances; And all the estate, &c. TO HAVE AND TO HOLD, &c. (*proceed ut ante*, p. 140, *but instead of the words* "In trust, nevertheless, for the said [*purchaser*], his appointees, heirs, and assigns, according to the uses and trusts which have been declared for his and their benefit as aforesaid," *say*, "In trust for the said [*purchaser*], his heirs and assigns, and to be assigned," &c.) IN WITNESS &c.

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hereditaments, and premises, comprised in and demised by the hereinbefore-recited indenture of mortgage, as is or are expressed to be conveyed and assured by the hereinbefore-recited indenture of release bearing even date herewith."

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16. ASSIGNMENT OF TWO TERMS TO ATTEND.

16. ASSIGNMENT *of two Satisfied Terms of Years in Trust to attend the Inheritance, on a Purchase by* COPARTNERS *in* TRADE.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*first assignor*], of &c., of the first part; [*second assignor*], of &c., of the second part; [*mortgagee*], of &c., of the third part; [*vendors*], of &c., of the fourth part; [*purchasers*], of &c., of the fifth part; and [*purchasers' trustee*], of &c., of the sixth part (*a*): WHEREAS, by indenture of release bearing even date with these presents, and expressed to be made between the said [*mortgagee*], of the first part; the said [*vendors*], of the second part; the said [*purchasers*], of the third part; and [C. D.], and [E. F.], of the fourth part; in consideration of the sum of £——, therein expressed to be paid by the said [*purchasers*] to the said [*vendors*], for the absolute purchase of the inheritance in fee-simple of the hereditaments thereinafter mentioned, the said [*vendor*] did convey and assure unto the said [C. D.] and [E. F.], their

Recital of purchase deed.

(*a*) As the two terms relate to different portions of the property, there is no objection to vesting them in the same trustee.

16. ASSIGNMENT OF TWO TERMS TO ATTEND.

heirs and assigns, ALL THAT (*describe parcels*), To hold the same unto and to the use of the said [C. D.] and [E. F.], their heirs and assigns, In trust for the said [*purchasers*] respectively, and their respective heirs, executors, and administrators, as tenants in common, and as part of their copartnership and stock in trade in their business of distillers, and in the same parts, shares, and proportions as they are entitled to in the said copartnership, and as or in the nature of personalty, and for that purpose to be sold and converted into money on the dissolution or determination of the said partnership, or sooner if the said partners shall think fit: AND WHEREAS, by indenture bearing date on or about the —— day of ——, in the year ——, and expressed to be made between [*grantor*], of the one part, and [*grantee*], of the other part; the said [*grantor*] did demise, grant, bargain, and sell unto the said [*grantee*] part of the hereditaments described in the recital hereinbefore contained, by the description of (*describe parcels*); *To hold* the same unto the said [*grantee*], his executors, administrators, and assigns, for the term of one thousand years, subject to a proviso for making void the same in manner therein mentioned: AND WHEREAS the proviso contained in the lastly hereinbefore (*b*) recited indenture has never taken, and is now incapable of ever taking, effect, but by divers mesne assignments, and other acts and assurances in the law, and ultimately by indenture, bearing date on or about the —— day of ——, in the year ——, and expressed to be made between [*termor*], of the first part; the said [*vendors*], of the second part; the said [*mortgagee*], of the third part; and the said [*first assignor*], of the fourth part; the said hereditaments comprised in and demised by the lastly hereinbefore recited indenture were assigned to and became absolutely vested in the said [*first assignor*] for the residue of the said term of one thousand years therein, *In trust* for the said [*mortgagee*], his executors, administrators, and assigns, for better securing the payment of the sum of £——, and interest, according to the proviso contained in a certain indenture of release therein recited, being an indenture of release by way of mortgage, by which the said sum of £——, and interest, were secured to the said [*mortgagee*], his execu-

—Of the deed creating one of the terms.

—Of assignment of term for the benefit of a mortgagee.

(*b*) If the purpose for which the term was created is disclosed by the recital, the accomplishment of such purpose ought to be shewn by the subsequent recitals. Here, both are avoided.

16. ASSIGNMENT OF TWO TERMS TO ATTEND.

tors, administrators, and assigns; and, from and after payment thereof, *In trust* for the said [*vendors*], their heirs and assigns, in the shares and proportions to which they were respectively entitled to the freehold and inheritance of the said premises by virtue of the said indenture of release, and to attend the inheritance, and to protect the same from mesne incumbrances. AND WHEREAS the principal and interest monies secured by the lastly hereinbefore-recited indenture of mortgage have been wholly paid off and discharged, as the said [*mortgagee*] doth hereby acknowledge (*c*). AND WHEREAS, by indenture bearing date on or about the —— day of ——, in the year ——, and expressed to be made between [*grantors*], of the one part; and [*grantee*], of the other part: the said [*grantors*] did demise, grant, bargain, and sell unto the said [*grantee*] (among other hereditaments), other part of the hereditaments described in the firstly hereinbefore-recited indenture of release, by the description of (*describe parcels*), *To hold* the same unto the said [*grantee*], her executors, administrators, and assigns, from the day of the date of the indenture now in recital, for the term of five hundred years, subject to a proviso or condition for making void the same indenture, which proviso or condition has never taken, and is now incapable of ever taking, effect; AND WHEREAS, by indenture, bearing date on or about the —— day of ——, and expressed to be made between &c., the said [*grantee in last deed*] did bargain, sell, assign, transfer, and set over, unto the said [*second assignor*], his executors, administrators, and assigns, the hereditaments comprised in the lastly hereinbefore in part recited indenture, *To hold* the same unto the said [*second assignor*], his executors, administrators, and assigns, thenceforth for the remainder of the said term of five hundred years, *In trust* for the said [*vendor*], his heirs and assigns; and to attend the reversion and inheritance of the said premises. AND WHEREAS the said [*purchasers*] have requested that the several residues of the said several terms of one thousand years and five hundred years as aforesaid, may be assigned to the said [*purchasers' trustee*], In trust for them, and to attend the inheritance in manner hereinafter mentioned. NOW THIS INDENTURE WITNESSETH,

—Of creation of the other term.

—Assignment of last-mentioned term to attend the inheritance.

—Request of purchasers that terms should be assigned.

Testatum.

(*c*) The mortgagee joins in the present deed for the purpose of authorizing the trustee to assign the term.

16. ASSIGNMENT OF TWO TERMS TO ATTEND.

that, in consideration of the premises, [and also in consideration of 10*s.* to the said [*first assignor*] already paid by the said [*purchasers' trustee*]], He the said [*first assignor*] [on the nomination and appointment of the said [*purchasers*], and by the direction and appointment, and with the privity, consent, and approbation of the said [*vendor*] and [*mortgagee*], so far as they respectively are interested, testified by their severally executing these presents], *Doth* by these presents bargain, sell, assign, and transfer unto the said [*purchasers' trustee*], his executors, administrators, and assigns, ALL such and so many, and such part and parts of the said —— and hereditaments described in the hereinbefore-recited indenture of release, bearing even date with these presents, as was or were assigned to the said [*first assignor*] by the hereinbefore in part recited indenture, bearing date on or about the —— day of ——, with their and every of their appurtenances; And all the estate, &c., (ut ante, p. 105), TO HAVE AND TO HOLD the said hereditaments, and all and singular other the premises intended to be hereby assigned or otherwise assured by the said [*first assignor*], with their and every of their appurtenances, unto the said [*purchasers' trustee*], his executors, administrators, and assigns, henceforth during all the residue now unexpired of the said term of one thousand years therein, and for all other the estate, term, and interest, if any, of the said [*first assignor*] therein, nevertheless, upon the trusts, and for the ends, intents, and purposes hereinafter expressed and declared concerning the same. (*Covenant by first assignor against incumbrances ut ante, p.* 106). AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the premises, [and also in consideration of 10*s.* of lawful money aforesaid, to the said [*second assignor*] already paid by the said [*purchasers' trustee*]], He the said [*second assignor*], [on the nomination and appointment of the said [*purchasers*], and by the direction and appointment of the said [*vendor*], testified as aforesaid], *Doth* by these presents bargain, sell, assign, and transfer unto the said [*purchasers' trustee*], his executors, administrators, and assigns, ALL such and so many, and such part and parts of the said —— and hereditaments described in the hereinbefore in part recited indenture of release, bearing even date with these presents, as was or were assigned to the said [*second assignor*], his executors, administrators, and assigns, by the hereinbefore in part recited indenture, bearing date

Vendor's trustee, on the nomination of purchasers, assigns to purchasers' trustee.

Premises comprised in first term.

Habendum.

Further testatum.

Vendor's trustee, on the nomination of purchasers, &c., assigns to purchasers' trustee.

Premises comprised in second term.

16. ASSIGNMENT OF TWO TERMS TO ATTEND.

on or about the —— day of ——, with their and every of their appurtenances, And all the estate, &c.; TO HAVE AND TO HOLD the said hereditaments, and all and singular other the premises intended to be hereby assigned or otherwise assured by the said [*second assignor*], with their and every of their appurtenances, unto the said [*purchasers' trustee*], his executors, administrators, and assigns, henceforth for and during all the residue now unexpired of the said term of five hundred years, and for all other the estate, term, and interest, if any, of the said [*second assignor*] therein, nevertheless upon the trusts, and to and for the ends, intents, and purposes hereinafter expressed and declared concerning the same.

Habendum.

Declaration of trusts.

(*Covenant by second assignor against incumbrances*). AND *it is hereby directed, declared, and agreed* by and between the parties to these presents, as far as they respectively are interested, that the respective residues now unexpired in the said several terms of one thousand years, and five hundred years, and all other the estates, terms, and interests, if any, hereinbefore respectively assigned to the said [*purchasers' trustee*], his executors, administrators, and assigns, are so assigned to him and them, *Upon trust*, nevertheless, for the said [*purchasers*] respectively, and their respective executors, administrators, and assigns, according to their respective shares in the capital of the said copartnership trade, and to be assigned and disposed of from time to time as they respectively shall direct and appoint; and in the meantime to attend, wait upon, and go along with the freehold, reversion, and inheritance of the sane hereditaments and premises, as the same have been conveyed and assured in or by the said indenture of release bearing even date with these presents; *To the end* that the same freehold, reversion, and inheritance, may, by means of the said terms or other estates and interests in the said hereditaments respectively, be protected from and against all incumbrances, (if any), mesne and subsequent to the creation of the same terms, estates, and interests respectively. IN WITNESS &c.

17. ASSIGNMENT *of two* TERMS *of Years in the same Property to separate Trustees* (*a*), *on a* SALE *by* TRUSTEES FOR SALE *under a Marriage Settlement,* IN TRUST *for better securing* MORTGAGE MONEY; *and, subject thereto,* IN TRUST *for the* PURCHASER, *and to* ATTEND *the* INHERITANCE.

17. OF TWO TERMS TO SEPARATE TRUSTEES TO ATTEND.

THIS INDENTURE, made the —— day of ——, BETWEEN [*first assignor*], of &c., only son, and also administrator de bonis non of the goods and chattels, rights, credits, and effects of [*deceased termor*], deceased, left unadministered by [*deceased executor*], deceased, of the first part; [*second assignor*], of &c., of the second part; [*trustees for sale*], of &c., and [*husband*], of &c., and [*wife*], his wife, of the third part; [*purchaser*], of &c., of the fourth part; [*mortgagee*], of &c., of the fifth part; [*trustee of first term*], of &c., of the sixth part; and [*trustee of the second term*], of &c., of the seventh part. WHEREAS, by indenture bearing date on or about the —— day of ——, and made between [*mortgagor*], of the one part; and [*mortgagee*], of the other part: the said [*mortgagor*] did grant, bargain, and sell unto the said [*mortgagee*], ALL THAT messuage or dwelling-house, &c. (*full description of the parcels*); *To hold* the same unto the said [*mortgagee*], her executors, administrators, and assigns, from the day next before the day of the date thereof, for the term of five hundred years, subject, nevertheless, to a proviso or condition therein contained for redemption of the said messuage and hereditaments, on payment by the said [*mortgagor*], his heirs, executors, administrators, or assigns, unto the said [*mortgagee*], her executors, administrators, or assigns, of the sum of 500*l.* and interest, on the —— day of ——, then next: AND WHEREAS default was made in payment of the said sum of 500*l.* and interest, on the day appointed for payment thereof by the said indenture; AND

Parties.

Recital of creation of term.

—Default in payment.

—Indenture of assignment.

(*a*) The terms are vested in separate trustees in order to prevent a merger. Where both or all the terms are clearly subsisting, no useful purpose seems to be answered by keeping on foot more than one. Vide ante, p. 107.

17. OF TWO TERMS TO SEPARATE TRUSTEES TO ATTEND.

WHEREAS, by indenture bearing date on or about the —— day of ——, and made between the said [*mortgagee*], of the first part; [J. S.], of the second part; and the said [*deceased termor*], deceased, of the third part: the said [*mortgagee*] did assign unto the said [*deceased termor*], the hereditaments and premises comprised in the said indenture of the —— day of ——, *To hold* the same unto the said [*deceased termor*], his executors, administrators, and assigns, for all the then remainder of the said term of five hundred years, In trust for the said [*husband*], his heirs and assigns, and to attend the inheritance of the same premises; AND WHEREAS the said [*deceased termor*], departed this life some time in the year ——, having duly made and published his last will and testament in writing, bearing date on or about the —— day of ——, and thereof appointed his brother [*brother*], and his the said testator's wife [*executrix*], executor and executrix thereof, and the said [*executrix*] alone duly proved the said will in the —— Court of——. AND WHEREAS the said [*executrix*] departed this life some time in the year ——, intestate; AND WHEREAS the said [*brother*], the brother of the said testator, hath departed this life without having proved the will of the said [*deceased termor*]; AND WHEREAS letters of administration of all and singular the goods, chattels, rights, and credits of the said [*deceased termor*], deceased, left unadministered by the said [*executrix*], have been granted by the —— Court of ——, unto the said [*first assignor*] (*b*); AND WHEREAS, by indenture bearing date on or about the —— day of ——, and made between the said [*mortgagor*], of the one part; and [*second mortgagee*], of the other part: For the considerations therein expressed, the said [*mortgagor*] did grant, bargain, sell, and demise unto the said [*second mortgagee*], (amongst other hereditaments), the messuage and other hereditaments hereinbefore described, *To hold* the same unto the said [*second mortgagee*], her executors, administrators, and assigns, from the day next before the day of the date thereof, for the term of five hundred years, subject to redemption on payment by the said [*mortgagor*], his heirs, executors, administrators, or assigns, unto the said [*second mortgagee*], her executors, administrators, or assigns, of the sum of 1200*l.* and interest, on the —— day of —— then next.

—Death of termor, will and probate.

—Death of executrix.

—Death of other executor without having proved.

—Letters of administration.

—Indenture creating second term.

(*b*) [As to the proper court in which to take out administration, vide ante, p. 109.]

17. OF TWO TERMS TO SEPARATE TRUSTEES TO ATTEND.

AND WHEREAS default was made in payment of the said sum of 1200*l.* and interest, on the day appointed for payment thereof by the said indenture of the —— day of ——. AND WHEREAS, by virtue of divers mesne assignments, and other acts in the law, and ultimately by indenture bearing date on or about the —— day of ——, and made between the said [*second mortgagee*], of the first part; [C. D.], of the second part; the said [*husband*], of the third part; and the said [*second assignor*], of the fourth part: The said messuage and other hereditaments comprised in the aforesaid term of five hundred years, granted by the said indenture of the —— day of ——, became vested in the said [*second assignor*] for all the then residue of the said term, In trust for the said [*husband*], his heirs and assigns, and to attend the inheritance. AND WHEREAS, by indentures of lease and release, bearing date respectively the —— and —— days of ——, the release being made between &c.; (being the settlement made previously to and in consideration of a marriage then intended and since solemnized between the said [*husband*] and [*wife*]); the messuage or dwelling-house and other hereditaments hereinbefore described were conveyed and assured unto and to the use of the said [*trustees for sale*], their heirs and assigns, upon such trusts as are therein declared, for the benefit of the said [*husband*] and [*wife*], and the issue of the said then intended marriage; in which indenture of release is contained a power enabling the said [*trustees for sale*], and their heirs, on the requisition and with the consent and approbation of the said [*husband*] and [*wife*], testified in writing under their hands and seals, and attested by two or more credible witnesses, to sell and convey the said messuage or dwelling-house and other hereditaments, and to give receipts for the monies for which the same should be sold. AND WHEREAS the said [*trustees for sale*], at the request and with the consent and approbation of the said [*husband*] and [*wife*], his wife, have contracted with the said [*purchaser*] for the sale and conveyance to him of the said messuage or dwelling-house and other hereditaments, and the inheritance thereof in fee-simple, free from incumbrances, with other hereditaments, at or for the price or sum of £——; And in consideration thereof, by indenture of release, bearing even date with these presents, and made between &c., and, as to the signing, sealing, and delivery thereof by the said [*husband*] and [*wife*], his wife, attested by two credible witnesses, the said

—Default in payment of mortgage money.

—Assignment to second assignor.

—Marriage settlement of husband and wife, with power to trustees to sell.

—Contract for sale.

—Conveyance under the power by release to mortgagee, subject to redemption by purchaser.

17. OF TWO TERMS TO SEPARATE TRUSTEES TO ATTEND.

messuage and other hereditaments hereinbefore described and comprised in the said several terms of five hundred years, and five hundred years, respectively, are with other hereditaments conveyed and assured *To the use* of the said [*mortgagee*], his executors, administrators, and assigns, for the term of two thousand years, subject to a proviso for making the same void upon payment by the said [*purchaser*], his heirs, executors, administrators, or assigns, unto the said [*mortgagee*], his executors, administrators, or assigns, of the sum of £—— and interest, on the time and in manner therein mentioned; And from and after the determination of the said term of two thousand years, and in the meantime subject thereto, *To the use* of the said [*purchaser*], his appointees, heirs, and assigns, in manner therein also mentioned.

—Agreement to assign.

AND WHEREAS, upon the treaty for the said purchase, it was agreed that the residues of the said several terms of five hundred years, and five hundred years, should be assigned to trustees to be named by the said [*purchaser*] and [*mortgagee*], upon and for the trusts, intents, and purposes hereinafter expressed and declared of and concerning the same.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, [and also in consideration of the sum of ten shillings sterling, to the said [*first assignor*] already paid by the said [*first trustee*],] the said [*first assignor*], at the request and by the direction of the said [*trustees for sale*], and [*husband*] and [*wife*], and on the nomination of the said [*purchaser*] and [*mortgagee*], (testified by their respectively executing these presents), *Doth* by these presents, bargain, sell, assign, transfer, and set over unto the said [*first trustee*], his executors, administrators, and assigns, the said messuage or dwelling-house, and all other the hereditaments hereinbefore described and comprised in the said term of five hundred years, created by the said indenture of the —— day of ——, together with their and every of their rights, members, and appurtenances; And all the estate, right, title, trust, term and terms for years yet to come and unexpired, property, possession, benefit, claim, and demand whatsoever of the said [*first assignor*], in, to, or out of the said messuage and other hereditaments, and every part thereof.

Administrator, by the direction of trustees, mortgagee, and purchaser, assigns to first trustee.

Parcels.

All the estate.

Habendum.

TO HAVE AND TO HOLD the said messuage or dwelling-house and other the hereditaments hereinbefore expressed to be hereby assigned, with their appurtenances, unto the said [*first trustee*], his executors, administrators, and assigns,

henceforth for and during all the rest, residue, and remainder of the said term of five hundred years, therein granted and demised by the said indenture of the —— day of ——, and now to come and unexpired; nevertheless, upon and for the trusts, intents, and purposes hereinafter expressed and declared of and concerning the same. (*Covenant by first assignor that he has not incumbered, ut ante, p.* 106). AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the premises, [and also in consideration of the sum of ten shillings sterling, to the said [*second assignor*] already paid by the said [*second trustee*]]; He the said [*second assignor*], at the request and by the direction of the said [*trustees for sale*], and [*husband*] and [*wife*], and on the nomination of the said [*purchaser*] and [*mortgagee*], (testified as aforesaid), *Doth* by these presents bargain, sell, assign, transfer, and set over unto the said [*second trustee*], his executors, administrators, and assigns, the said messuage or dwelling-house and other hereditaments hereinbefore described, and comprised with other hereditaments in the said indenture of the —— day of ——, and the said term of five hundred years thereby created, with their and every of their rights, members, and appurtenances; And all the estate, right, title, interest, trust, term and terms for years yet to come and unexpired, property, possession, benefit, claim, and demand whatsoever of the said [*second assignor*], in, to, and out of the said messuage and other hereditaments, and every part thereof; TO HAVE AND TO HOLD the messuage and other hereditaments lastly hereinbefore expressed to be hereby assigned, with their appurtenances, unto the said [*second trustee*], his executors, administrators, and assigns, for and during all the rest, residue, and remainder of the said term of five hundred years therein granted and created by the recited indenture of the —— day of ——, and now to come and unexpired; Nevertheless upon and for the trusts, intents, and purposes, hereinafter expressed and declared of and concerning the same. (*Covenant by second assignor that he has not incumbered*). AND *it is hereby agreed and declared between and by the said parties hereto*, that they the said [*first trustee*] and [*second trustee*] respectively, and their respective executors, administrators, and assigns, shall henceforth stand possessed of and interested in the said messuage and other hereditaments for the respective residues of the two several terms of five hundred years and five hundred years, for the better

17. OF TWO TERMS TO SEPARATE TRUSTEES TO ATTEND.

Further testatum.

Second assignor, by direction of trustees, mortgagee, and purchaser, assigns to second trustee.

Parcels.

All the estate.

Habendum.

Declaration of the trusts of terms,

To secure mort-

17. OF TWO TERMS TO SEPARATE TRUSTEES TO ATTEND.

and more effectual securing unto the said [*mortgagee*], his executors, administrators, and assigns, payment of the said sum of £—— and interest, according to the purport, true intent, and meaning of the said indenture of release, bearing even date herewith; And from and after full payment thereof, *Upon trust*, in the next place, for the said [*purchaser*], his heirs, appointees, and assigns, and to be respectively assigned and disposed of from time to time, as he or they shall direct or appoint; And in the meantime to attend, wait upon, and go along with the reversion, freehold, and inheritance of the same premises, in order and to the intent to protect and preserve the same from all mesne charges and incumbrances, if any such there be. IN WITNESS, &c.

gage money; and, subject thereto,

In trust for purchaser, and to attend the inheritance.

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18. APPOINTMENT IN FEE.

18. APPOINTMENT *in Fee* (*a*) *to* USES *to* PREVENT DOWER. (*Variation where the Property is sold* SUBJECT *to a* MORTGAGE *for a* TERM (*b*)). (*A short Form*).

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of &c., of the first part; [*purchaser*], of &c., of the second part; and [*purchaser's trustee*], of &c., of

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(*a*) The advantages and disadvantages attending the conveyance by appointment, as compared with a lease and release, have already been pointed out. (Ante, p. 68.) The necessity of choosing between these assurances, of course, only arises, when the vendor has both a power, and an estate co-extensive with that power; which is the effect in substance of the ordinary uses to prevent dower; but the precedent in the text is equally adapted to a case in which the vendor has a power only, and in which therefore he has no such choice.

Form of conveyance not varied by a mortgage for a term.

(*b*) A mortgage *for a term*, and not in fee, has been selected for the variation, because, as such a mortgage merely subtracts the term from the vendor's estate, without disturbing the uses of the inheritance out of which it is carved, the form of the conveyance is not altered by the existence of such a mortgage; whereas, if the mortgage were *in fee*, the vendor, having only the equity of redemption of the inheritance, and not the legal inheritance subject to a term, as in the former case, would have no estate which could be the subject of an appointment; though, as we shall presently see, it is usual to convey interests of this kind by lease and release, for which a distinct precedent will be given.

18. APPOINTMENT IN FEE.

Recitals.

the third part: WHEREAS (*c*) by indenture of release [founded on a lease for a year and] dated the —— day of ——, and made &c., the hereditaments hereinafter described were assured (*shortly recite the power*) (*d*); AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the said hereditaments, for an estate of inheritance in fee-simple (*e*), at or for the price or the sum of £——. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said contract, and in consideration of the sum of £—— sterling, paid by the said [*purchaser*] to the said [*vendor*] before the execution of these presents, the receipt whereof the said [*vendor*] doth hereby acknowledge, and therefrom doth absolutely discharge the said [*purchaser*], his appointees, heirs, and assigns (*f*), he the said [*vendor*], by virtue and in execution of the power reserved to

Testatum.

In consideration of £—— vendor appoints.

Recital that hereditaments hereby appointed stand limited to certain uses.

(*c*) If it is desirable, for the sake of brevity, or for any other reason, to avoid referring to the conveyance, the recital may be thus—

"AND WHEREAS the hereditaments hereinafter described, and intended to be hereby appointed, now stand limited to such uses, for such estates, and in such manner and form, as the said [*vendor*] shall by any deed or deeds direct or appoint; and, in default of such direction or appointment, to uses for the benefit of the said [*vendor*], his heirs and assigns for ever."

It is not absolutely necessary to refer to the power at all. If no such reference be made, the only recital will be, that the purchaser has contracted for the purchase of the fee-simple, and then, by virtue of all powers enabling him, the vendor will appoint to the uses, and covenant generally that he has power to appoint, &c.

(*d*) If the sale is subject to an existing mortgage, shortly recite the mortgage deed, and add—

Variations where conveyance is subject to a mortgage.

"AND WHEREAS there is now owing to the said [*mortgagee*], by virtue of his said mortgage security, the principal sum of £——, but all interest thereon hath been paid by the said [*vendor*] up to the day of the date of these presents."

(*e*) "subject to the said mortgage debt, but free from all other incumbrances."

(*f*) "And also in consideration of the covenant hereinafter contained on the part of the said [*purchaser*] to pay the said mortgage debt of £——, and the interest to become due thereon."

18. APPOINTMENT IN FEE.

him by the said indenture of release (*g*), and of all other powers enabling him in this behalf, *Doth*, by these presents, absolutely limit, direct, and appoint, that ALL THAT (*describe parcels*), together with all and singular the rights, members, and appurtenances to the same premises belonging, shall, immediately after the execution of these presents, remain and be to the uses following, that is to say, *To such uses*, and for such estate or estates, intents and purposes, and in such manner and form, as the said [*purchaser*] shall at any time, or from time to time, by any deed or deeds, appoint; and, in default of and subject to any such appointment, *To the use* of the said [*purchaser*] and his assigns, during his life, without impeachment of waste; and immediately after the determination of that estate by any means (*h*), *To the use* of the said [*trustee*], his execu-

Uses to prevent dower.

(*g*) If the recital be in general terms, that the hereditaments stand limited, &c., ut ante, p. 155, n. (*c*), instead of the words in the text, say—

"By virtue and in execution of the hereinbefore recited power or authority, and of all other powers," &c.

Form of the limitations to prevent dower.

(*h*) [In nearly all the forms in common use, the words "in his lifetime" are here added; and the form is so given by the learned Fearne: —"For this purpose the land may be limited to the use of his appointees, &c. (in the fullest manner), and in default of appointment, to the use of him and his assigns during his life; and from and after the determination of that estate by any means *in his lifetime*, to the use of some person and his heirs during the natural life of the purchaser, in trust for him and his assigns; and from and after the determination of the estate so limited in use to the said trustee and his heirs, to the use of the purchaser, his heirs and assigns for ever." Cont. Rem. p. 347, n., 7th ed. The words printed in italics in the above extract, appear to prevent the intended effect of the limitation. Without them, the efficacy of the limitation has been settled by authority. 3 Lev. 437. With them, there is no decision or authority in its favour, except *Cordal's case*, Cro. El. 316, which has been repeatedly overruled. See Cas. Temp. Hardw. 13; 2 Saund. 386*.]

[It is to be premised, that though this objection does not apply to the preliminary power of appointment, which would enable the husband to defeat his wife's dower after it had attached, but only to the subsequent limitations in default of appointment, it may be important wherever

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* [Of course, when dower attaches upon an estate which is subject to open and let in a contingent remainder, it attaches subject to such opening, and will be defeated if the remainder become vested; and, for anything that appears upon the report of *Cordal's case*, this was all that was decided upon the question of dower.]

tors, and administrators, during the natural life of the said [*purchaser*], *Upon trust* for the said [*purchaser*] and his as- 18. APPOINTMENT IN FEE.

(as sometimes happens) the power is not inserted in the limitations; or where upon a sale, for want of some due formality, or for some other reason, it is not exercised; or where the husband dies without having sold the estate or exercised the power, and the widow claims her dower against his devisee or heir. The omission (in pursuance of the recommendations of Mr. Butler and other eminent conveyancers) of any testamentary power, may give rise to many cases of this kind.] Limitations to prevent dower.

[At common law, the well-known rule is, that dower does not attach upon an estate of inheritance in remainder, whether vested or contingent; and the object of the limitation to the trustee is, to prevent the estate for life of the husband from so uniting with his remainder in fee, as to bring the latter into the position of an estate in present possession. By interposing a vested estate of freehold in another person, such union or merger is prevented. By interposing a contingent estate of freehold, (less than a fee-simple), such union or merger is not prevented so long as the estate remains contingent, and the two estates unite subject to be disunited upon the happening of the contingency. *Hooker* v. *Hooker*, Cas. Temp. Hard. 13; 2 Saund. 386: *Colson* v. *Colson*, 2 Atk. 247: *Chudleigh's case*, 1 Rep. 80; Co. Litt. 28. a.]

[The form was suggested by the case of *Duncomb* v. *Duncomb*, 3 Lev. 437, where the limitation, as reported, was to W. Duncomb for life, the remainder to J. S. and his heirs, for the life of W. Duncomb, the remainder in tail to W. Duncomb. W. Duncomb married the demandant and died without issue, and it was objected to her claim of dower, that the remainder to J. S. was but a possibility in case the tenant for life should commit forfeiture, but in the meantime the whole estate was executed in W. Duncomb. The reporter merely says, that upon the first argument the Court hastily gave judgment for the tenant; obviously upon the ground that the remainder to J. S. was vested, as was expressly decided upon a similar limitation in the case of *Smith* d. *Dormer* v. *Parkhurst*, 18 Vin. Abr. 413; Willes, 327; 3 Atk. 135; 1 Bro. P. C. 353, where the question was, not whether dower attached, but distinctly whether the estate vested.] *Duncomb* v. *Duncomb*.

[The reason for holding such a remainder to be vested is plain, when the definition of a vested remainder is remembered, namely, that it is a remainder limited to commence upon such conditions as must necessarily include every possible event on which the preceding estate may determine. And in considering the terms in which the remainder is limited to commence, we wholly shut out of view the manner in which it is limited to determine; so that if, looking at the manner of its commencement alone, and regarding it as of infinite duration, we find it vested,—it is not the less vested, because in respect of its duration it is so precarious, that the time for its determination may arrive before the time for its commencement in possession. "It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that every remainder for life or in tail is and must be liable, as the remainderman may die, or die without issue, before the death of the tenant Remainder when vested.

18. APPOINTMENT IN FEE.

signs; and immediately after the determination of that estate, *To the use* of the said [*purchaser*], his heirs and assigns for

Limitations to prevent dower.

for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." Fearne, C. R., 7th ed.* If, indeed, the duration of the remainder is so accurately adjusted to the duration of the preceding estate, that the moment of its commencement must necessarily in every event coincide with the moment of its determination, it is void; not for any reason founded on the learning of remainders, but because a limitation which on the face of it does not profess to confer in any event an interest of an appreciable duration, can only be treated as a nullity. And this is all that Mr. Fearne means, when he says that a remainder to B. for the life of A., following a limitation to A. for his own life, would be absolutely void, were it not for the possibility of its taking effect by the forfeiture or surrender of A.'s estate†.]

Definition of a contingent remainder.

* [So, in *Parkhurst* v. *Smith*, in Dom. Proc. (Willes, 337), Willes, C. J., in delivering the opinion of the Judges, said, "The definition which was given by the counsel for the appellants of a contingent remainder which does not vest, is, 'where the particular estate may determine before the remainder can take place in possession, and that if it is uncertain when it will take place in possession, and it may happen that it never will take place in possession, the remainder will not vest.' But this is not a just definition; for if this were true, it would overturn all the settlements that ever were made. I will mention but one instance, though I might mention a thousand; as where an estate is limited to A. for his life, remainder to another and the heirs of his body; I believe no man in his senses ever doubted but this was a vested remainder; and yet it is within their definition; for suppose the remainderman in tail dies without issue before the tenant for life, then this remainder will never take place in possession. As, therefore, this is not a proper definition, we beg leave to acquaint your Lordships what we think is; and we think there are but two sorts of contingent remainders which do not vest: first, where the person to whom the remainder is limited is not in esse at the time of the limitation; secondly, where the *commencement* of the remainder depends on some matter collateral to the determination of the particular estate."]

† [Is this quite clear? If the owner of the fee lease to A. for life, reserving a rent, can he not afterwards grant the reversion, with the rent incident to it, to B. for the life of A.? (See *Burton* v. *Barclay*, 5 Moo. & P. 785, ante, p. 84). If he can do this, are there no means of limiting, in the original lease, the same reversion to B. for the same estate, by way of remainder, and, therefore, so as to be operative, though a forfeiture or surrender by A., for B.'s benefit, were impossible? The law is very obscure as to the right of the remainderman to rent reserved upon the creation of the particular estate. It is clear, however, that a freehold remainderman is entitled to rent made payable by a particular tenant for years.]

ever: [And to, upon, or for no other use, trust, intent, or purpose whatsoever]. And the said [*purchaser*] doth hereby declare that any wife of him the said [*purchaser*] who may happen to survive him, and who shall not be excluded from dower by means of the limitations hereinbefore contained shall not be entitled to dower in or out of the said —— and hereditaments. And the said [*vendor*] for himself, his heirs, executors, and administrators, *Doth* hereby covenant with the said [*purchaser*] and his heirs, that, notwithstanding any act, deed, matter, or thing, made, done, or permitted by the

18. APPOINTMENT IN FEE.

Declaration against dower.

Vendor's covenants for title,

[If, then, the duration of an estate in remainder is not to be looked at for the purpose of determining whether it is vested or contingent, it must be indifferent, in considering such a question, whether we regard the remainder as an estate for life, in tail, or in fee-simple, if we only avoid reducing it to a nullity. If a remainder, limited to A. and his heirs for ever, is contingent, it must be contingent when limited to him for life only; and if it is vested in the one case, it must be vested in the other. This being premised, it will easily be seen whether the particular limitation in question is vested or contingent. The common form runs thus—"To the use of A. during the term of his natural life, without impeachment of waste, and after the determination of that estate *in his lifetime*, to the use of B., his executors and administrators, during the life of A." B.'s estate is limited to commence after the determination of A.'s estate in his lifetime, an event which may never happen, although the determination of B.'s estate by some means must happen. If A.'s estate determine by his death, as it is most likely to do, B.'s estate is not to commence by the terms of the limitation. It is therefore contingent. Try it by substituting a fee-simple for a life estate—"To A. for his life, and after the determination of that estate in his lifetime, to B., his heirs and assigns." Here, B.'s estate is undeniably contingent; can it be made to vest by reducing it to an estate pour autre vie?]

Limitations to prevent dower.

[Where there is a vested particular estate, a remainder in fee limited upon it is vested, unless into the limitation of such remainder a new contingency is imported. Now, let the limitations run thus—"To the use of A. for his life, and after the determination of that estate in his lifetime, to the use of B. for the life of A.; and after the determination of B.'s estate, to the use of C. and his heirs; but in case A.'s estate shall not determine in his lifetime, to the use of D. and his heirs." The limitations to C. and D. are unquestionably not shifting uses, but are remainders upon a contingency with a double aspect; yet, if B.'s estate is vested, C.'s remainder on it must be vested also, for there is no contingency expressed in the limitation of that remainder. The contingency, if not contained in the limitation to B., first appears in the limitation to D.; but a contingency to prevent the effect of a limitation, first introduced into the limitation which follows, makes the latter no remainder, but a shifting use. Fearne C. R. p. 13.]

18. APPOINTMENT IN FEE.

said [*vendor*] to the contrary (*i*), the above-recited power is, at the time of the execution of these presents, a good, valid, and subsisting power; and that, notwithstanding any such act, deed, matter, or thing as aforesaid, the said [*vendor*] now hath in himself lawful and absolute authority, by these presents, to limit or appoint the said hereditaments and premises with the appurtenances to the uses aforesaid, according to the true intent of these presents; *And also*, that notwithstanding any such act, deed, matter, or thing, as aforesaid, the said hereditaments and premises shall henceforth remain and be to the uses hereinbefore declared concerning the same, and shall or may be peaceably and quietly held and enjoyed, and the rents and profits thereof received and taken accordingly, without any interruption or denial whatsoever by the said [*vendor*], or his heirs, or any person or persons claiming under or in trust for him or them; And that, free and clear, and by the said [*vendor*], his heirs, executors, or administrators, effectually exonerated from all charges and incumbrances whatsoever, created, occasioned, or permitted by the said [*vendor*], or any person or persons whomsoever, claiming under or in trust for him (*k*): *And lastly*, that the said [*vendor*] and his heirs, and every person whosoever claiming any estate, right, title, or interest, at law or in equity, in, to, or out of the said hereditaments and premises, or any part thereof, by, from, under, or in trust for him or them (*l*), will and shall at all times hereafter, upon every request in writing, and at the costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, or execute every such lawful act, deed, appointment, conveyance, or assurance in the law whatsoever, for more effectually appointing, confirming, or otherwise assuring the said hereditaments and premises to the uses aforesaid, or to such uses, and for such other purposes,

And for further assurance.

(*i*) If the sale is subject to a mortgage say—

Variation where conveyance is subject to a mortgage-term.

"except as hereinafter mentioned."

(*k*) Add, if the sale is subject to the mortgage—

"except the above-recited mortgage-term of one thousand years, and the said principal sum of £——, thereby secured, with the interest henceforth to accrue due thereon."

(*l*) Add, if the exception supra be inserted—

"except the person whose estate or interest is hereinbefore excepted."

as the said [*purchaser*], his appointees, heirs, or assigns, shall order or direct, and in such manner as by him or them, or his or their counsel in the law shall be reasonably advised and required (*m*). IN WITNESS, &c.

18. APPOINTMENT IN FEE.

(*m*) Add, if the sale is subject to the mortgage—

"And the said [*purchaser*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*vendor*], his heirs, executors, and administrators, that he the said [*purchaser*], his heirs, executors, or administrators, will or shall pay the said principal sum of £——, owing to the said [*mortgagee*] as aforesaid, and the interest henceforth to become due thereon; and will or shall at all times hereafter effectually keep indemnified the said [*vendor*], his heirs, executors, and administrators, from all actions, suits, costs, damages, and expenses whatsoever, by reason of the non-payment thereof."

Covenant by purchaser to pay the mortgage debt.

Add also, if such be the intention, a declaration to the following effect:—

"And the said [*purchaser*] doth hereby declare that as between his real and personal representatives, the said principal sum of £——, and the interest thereon, shall be deemed to be the debt of the said hereditaments, and the person or persons taking the same by descent, devise, or otherwise, shall not be entitled to have the said mortgage debt, or any part thereof, paid off and discharged out of the personal estate of the said [*purchaser*]." (*Vide ante, Vol. 5, p. 369*).

Declaration that the land shall be primarily liable to the mortgage debt.

[Add also, if deemed expedient, a declaration that the mortgage debt shall be kept on foot as a protection, ut infra, p. 222.]

19. RELEASE IN FEE.

19. RELEASE *in Fee by a Vendor claiming by* DESCENT, *to a Purchaser, to Uses excluding Dower, so far as may be without a Trustee. Variation, where the Wife joins for the purpose of extinguishing her* DOWER (*a*). (*A short Form*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of &c. (*b*), of the one part; and [*purchaser*], of &c., of the other part: WHEREAS [*vendor's father*], late of ——, deceased, being at the time of his death seised of (*c*), and absolutely entitled to, the hereditaments herein-

Parties.

Recital of ancestor's seisin, death, &c.

Remark as to dower.

(*a*) The fee having descended upon the vendor, if he were married, his wife would be dowable, supposing her claim to dower not to have been barred by a jointure, or excluded by means of the assignment of an outstanding term, unless the marriage were since the first of January, 1834, in which case the dower, being within the recent Dower Act, may be excluded by the husband's alienation.

(*b*) If the wife is a party, add—

"and [*wife*] his wife."

Mode of reciting descents under stat. 3 & 4 Will. 4, c. 106.

(*c*) [In this form of recital the descent is supposed to have happened prior to the year 1834. In descents occurring since the year 1833, the heirship is traced from the last *purchaser*, and the actual seisin, either of the purchaser or of any intermediate ancestor, is immaterial. Stat. 3 & 4 Will. 4, c. 106, s. 2. Vide ante, Vol. 1, p. 138, 144; *Doe* d. *Parker* v. *Thomas*, 4 Scott, N. R. 449. In reciting, therefore, a descent under the new law of inheritance, the material fact to be noticed is the purchase by the ancestor from whom the descent is traced; the intermediate descents, if any occurred, may be mentioned for the sake of perspicuity, and to preserve information which may hereafter be important. If the date and particulars of the purchase by the ancestor are known, the recital will commence with a statement of the deed or will under which he became entitled; if these particulars are not known, or if it is desirable for any reason not to disclose them, the draughtsman must content himself with a general recital of the ancestor's title by purchase, which may be thus expressed—

"Whereas [*purchasing ancestor*] formerly of ——, and now deceased, being at the time of his decease absolutely entitled by purchase to the hereditaments hereinafter described for an estate of inheritance in fee-simple in possession, died on the —— day of ——, intestate as to the said hereditaments, and without having been married:

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after described, for an estate of inheritance in fee-simple in possession, died on the —— day of ——, intestate as to the said hereditaments, (his will having been attested by one witness only), leaving the said [*vendor*] his heir-at-law; the said [*vendor*] being the eldest son of the said [*father*] by [*father's wife*], his late wife, now deceased, and with whom the said [*father*] intermarried on the —— day of ——, the marriage having been solemnised in the parish church of ——, on the —— day (*d*) of —— (*e*): AND WHEREAS the said [*vendor*] was christened in the parish church of ——, on the —— day of ——: AND WHEREAS the said [*vendor*] is unmarried (*or, as the fact may be,* was unmarried on the second day of January, 1834): AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the hereditaments hereinafter described for an estate of inheritance in fee-simple in possession, free from all incumbrances (including the land-

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AND WHEREAS the said [*purchasing ancestor*] was the eldest son of [A. B.] of ——, by [S.] his wife, who were married in the parish church of ——, on the —— day of ——: AND WHEREAS the said [A. B.] died on the —— day of ——, and is buried at ——: AND WHEREAS the second son of the said [A. B.], by his said wife, was [C. B.] of ——, who was baptized at the parish church of ——, on the —— day of ——, and died on the —— day of ——, and is buried at ——: AND WHEREAS the said [*vendor*] is the heir-at-law of the said [*purchasing ancestor*], being the eldest son of the said [C. B.] by [T.] his wife, with whom the said [C. B.] intermarried on the —— day of ——, the marriage" &c.]

[In some cases it may be impossible to ascertain who was the purchasing ancestor, and consequently impossible to discover the heir with certainty. Under such circumstances the propriety of framing a recital of an imaginary purchase by the most remote ancestor that can be traced, for the purpose of giving the title a better appearance, may deserve consideration.]

(*d*) If the practice, often recommended in the course of this work, of stating in the recital of deeds of conveyance, the time and place of baptisms, marriages, and deaths, (where they are material to the title), had prevailed for the last century, how much would the procuration of evidence in establishment of titles have been facilitated!

(*e*) If the vendor's wife joins, add—

"AND WHEREAS the said [*wife*], the wife of the said [*vendor*], hath consented to join in these presents, for the purpose of extinguishing her dower in the said hereditaments."

Recital that vendor's wife has consented to join.

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tax, which has been redeemed): NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £—— sterling, paid by the said [*purchaser*] to the said [*vendor*] at the time of the execution of these presents, the receipt whereof the said [*vendor*] doth hereby acknowledge, [and therefrom doth release and discharge the said [*purchaser*], his appointees, heirs, executors, administrators, and assigns, for ever, by these presents], the said [*vendor*] *Doth* by these presents, made in pursuance of an Act of Parliament passed in the fourth year of the reign of Queen Victoria, intituled "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties," grant, bargain, sell, release, and confirm (*f*) unto the said [*purchaser*] and his heirs, ALL THAT (*describe parcels*); and all rights, easements, liberties, privileges, and appurtenances, to the said —— and hereditaments belonging, or in anywise appertaining; And the reversion and reversions, remainder and remainders thereof; And all the estate, right, title, interest, property, claim, and demand whatsoever, of the said [*vendor*], in, to, and upon the said hereditaments and premises; TO HAVE AND TO HOLD the said ——, hereditaments, and premises, with their appurtenances, unto the said [*purchaser*] and his heirs, TO SUCH USES (*g*),

Testatum.

Vendor in consideration of £——, releases to purchaser.

And the reversion, &c.

Habendum.

General power.

(*f*) Add, if the wife joins—

"And the said [*wife*], with the privity and consent and at the request of the said [*vendor*], *Doth* remise, release, and quit-claim."

Remarks on the limitations in the text.

(*g*) Where it is intended that the purchaser shall immediately, or soon after the sale, convey the inheritance for the purpose of making a mortgage in fee, or otherwise, the uses in the text may be substituted for the ordinary limitations to prevent dower. (Ante, p. 156). They would have the effect of excluding the dower, as against the appointees of the purchaser by deed or will, but not as against his heir, or his devisees or alienees not claiming by appointment; for, the purchaser being seised of the inheritance in possession, and not (as under the usual limitations to prevent dower) of an estate for life; with remainder in fee, separated by an intervening estate pur autre vie in the trustee, the dower attaches as to all persons being *in* under the purchaser. The exclusion of dower, therefore, in the present case, is carried just so far as the purposes of alienation require; and beyond this, perhaps, in strict justice to the widow, it ought not to go, she being as proper an object of regard as the heir, who may be a very remote relative of the ancestor. If, however, the purchaser should happen to convey or devise the estate, by virtue of his ownership, instead of exercising his power, the dower

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and for such estates and interests, intents and purposes, as the said [*purchaser*] by any deed or deeds, or by his last will, shall direct or appoint; And in default of such direction or appointment, To THE USE of the said [*purchaser*], his heirs and assigns for ever (*h*); And the said [*purchaser*] doth hereby declare that his widow shall not be entitled to dower out or in respect of the said hereditaments: AND the said [*vendor*], for himself, his heirs, executors, and administrators, *Doth* hereby covenant with the said [*purchaser*], his heirs, and assigns, that, notwithstanding any act, deed, matter, or thing by the said [*vendor*], or the said [*vendor's father*], deceased, made, done, occasioned, or knowingly suffered, he the said [*vendor*] (*i*), at the time of the sealing and delivery of these presents (*k*), hath in himself full power, and lawful and absolute right, by these presents, to grant and assure the said hereditaments and premises hereinbefore expressed to be hereby released, with their appurtenances, unto the said [*purchaser*] and his heirs, to the uses aforesaid, according to the true intent and meaning of these presents; *And also*, that it shall be lawful for the said [*purchaser*], his appointees, heirs, and assigns, at all times hereafter to enter into, and hold and enjoy, all the said hereditaments and premises, and to receive and take the rents and profits thereof, to and for his and their own use and benefit, without any hindrance, disturbance, claim, or demand whatsoever, from or by the

Vendor covenants that, notwithstanding &c., he has power to convey.

For quiet enjoyment.

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would be let in: and difficult questions sometimes arise, particularly upon the construction of wills, whether they operate as appointments or not. For these reasons, it seems advisable to adhere to the ordinary limitations to prevent dower, rather than to adopt those in the text, unless where the purchaser is about to convey the estate as first supposed. The preceding remarks, of course, only apply to the dower of widows who were married on or before the 1st of January, 1834. If the purchaser were married *since* that period, the limitations in the text might be conveniently adopted, whether the purchaser were about to mortgage or not, as the declaration would absolutely exclude the dower, as against the heir, or any devisee or alienee, and the power would be useful for other purposes. Vide ante, p. 75.

(*h*) If the wife joins—

"and [*wife*] respectively."

(*i*) "and the said [*wife*], his wife."

(*k*) "have in themselves, or one of them hath in himself or herself, full power, &c."

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said [*vendor*], or his heirs (*l*), or any other person or persons lawfully or rightfully claiming through, under, or in trust for him (*m*) or them, or through, under, or in trust for the said [*vendor's father*], deceased, or by or through the acts, defaults, privity, consent, or procurement of them, or of any of them: *And also*, that the said hereditaments and premises now are free and clear of and from all estates, charges, and incumbrances whatsoever, made, occasioned, or suffered by him the said [*vendor*] (*n*), or by the said [*vendor's father*], deceased, or any person or persons claiming through, under, or in trust for them, or either of them, or by or through the acts, defaults, privity, consent, or procurement of them, or of any of them; *And moreover*, that he the said [*vendor*], and his heirs (*o*), and all other persons lawfully or rightfully claiming any estate, right, title, or interest, in, to, or out of, the said hereditaments and premises, or any part thereof, through, under, or in trust for him (*p*) or them, or through, under, or in trust for the said [*vendor's father*], deceased, will and shall, from time to time, and at all times hereafter, upon the request and at the costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, and execute all such further or other lawful acts, deeds, conveyances, and assurances for the more effectually conveying and assuring of the said hereditaments and premises, with their appurtenances, to the uses aforesaid, or to such other uses, and in such manner, as the said [*purchaser*], his appointees, heirs, or assigns shall direct, as by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel, shall be reasonably advised and required (*q*). IN WITNESS, &c.

Free from incumbrances.

And for further assurance.

Variations where wife joins.

(*l*) Add, if the wife joins—
"or the said [*wife*], his wife."

(*m*) "her."

(*n*) "or the said [*wife*], his wife."

(*o*) "and the said [*wife*], his wife."

(*p*) "her."

(*q*) [When the wife joins, some gentlemen add—
"And, lastly, that these presents shall forthwith, at the costs and charges of the said [*vendor*], his heirs, executors, or administrators, be duly acknowledged by the said [*wife*], and otherwise perfected with the solemnities prescribed

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by law for rendering the deeds of married women effectual to bind their estates and interests in land."

But this seems to be superfluous and improper. The purchaser will take care not to pay his purchase-money until the deed is duly perfected.]

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20. ASSIGNMENT *of* LEASEHOLDS *by a* VENDOR *to a* PURCHASER. EXECUTION *by* ATTORNEY *and Attestation.* (*Variation where the Assignment is made by two* TENANTS *in* COMMON (*a*)).

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THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part: WHEREAS, by an indenture of lease, bearing date on or about the —— day of ——, made between [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part; the said [*lessor*] demised unto the said [*lessee*], his executors, administrators, and assigns, *All that* (*b*) (*describe parcels*), with the appurtenances thereunto belonging, *To hold* the same unto the said [*lessee*], his executors, administrators, and assigns, from the —— day of —— then last for the term of —— years then next ensuing, at the yearly rent of £——, payable quarterly, as therein mentioned, and subject to the observance and performance of the covenants and conditions in the said indenture of lease expressed, and on the part of the lessee therein named to be observed and performed. AND WHEREAS, by divers mesne assignments, or other assurances or means effectual in the law, the said leasehold premises became absolutely vested in the said [*vendor*] for all the residue of the said term of —— years granted by the said indenture of lease, for his own use

Recital of lease.

Parcels.

—that lease has become vested in assignor.

(*a*) The variations throughout the precedent are referred to by the marks †, ‡, &c. Where the alteration was merely the substitution of the plural for the singular number of the word *vendor*, the variation has not been noticed.

(*b*) In assignments of leasehold interests, it is usual to describe the parcels in the recital of the deed creating the term. If the description has undergone any subsequent alteration, it should be stated, as in the recital added in the next note.

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—of contract for purchase.

and benefit (*c*). AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the said leasehold premises, for all the residue of the said term of —— years, subject to the rent and covenants of the said indenture of lease, at the price or sum of £——. NOW

Testatum.

THIS INDENTURE WITNESSETH, that, in pursuance

In consideration of £—— assignor assigns to assignee.

of the said agreement, and in consideration of the sum of £—— of lawful British money, paid by the said [*purchaser*] to the said [*vendor*] at or immediately before the execution of these presents, the receipt whereof, and that the same is in full for the absolute purchase of the premises hereby assigned, he the said [*vendor*] doth † hereby acknowledge, and from the same doth‡ release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, he the said [*vendor*] *Doth* by these presents § grant, sell, assign, and transfer unto the said [*purchaser*], his executors,

Parcels.

administrators, and assigns, *All and singular* the said —— and premises hereinbefore described (*d*); which premises are now in the tenure or occupation of [*tenant*] as tenant to the said [*vendor*]; and all other the premises comprised in and

General words.

demised by the hereinbefore recited indenture of lease; And all and singular the rights, members, and appurtenances to the said premises, or any part thereof, belonging or appertaining, or therewith usually held and enjoyed, together with the said indenture of lease; and the full and whole force, benefit, and effect thereof; *And* all the estate, right, title, in-

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(*c*) If the assignment is made by the lessee, this recital of course will be omitted. If only one assignment has occurred since the granting of the lease, then, instead of the recital in the text, a short recital of the assignment may be introduced. Add, if the fact be so—

That vendor has erected a messuage on the ground demised by the lease.

"AND WHEREAS the said [*vendor*] hath erected and built a messuage or dwelling-house, stable, and out-buildings on the said piece of ground and premises comprised in and demised by the hereinbefore recited indenture of lease."

† "they the said [*vendors*] respectively do hereby," &c.

‡ "do."

§ "they the said [*vendors*] *Do*, and each of them *Doth*, by these presents, grant, sell, assign," &c.

(*d*) "together with the messuage or dwelling-house, stable, out-buildings, and offices erected and built thereon as aforesaid."

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terest, term and terms for years now to come and unexpired, right of renewal, benefit, claim, and demand whatsoever, both at law and in equity, of him the said [*vendor*]† in, to, and out of the said premises, and every part thereof; TO HAVE AND TO HOLD the said ——, and other the premises intended to be hereby assigned unto the said [*purchaser*], his executors, administrators, and assigns, henceforth, for all the residue and remainder now to come and unexpired of the said term of —— years granted by the hereinbefore recited indenture of lease, and for all other the estate, term, and interest (if any) of him the said [*vendor*] in the said premises, or any part thereof; subject, nevertheless, to the payment of the rent, and the observance and performance of the covenants, conditions, and agreements respectively reserved and contained by and in the hereinbefore recited indenture of lease, and which, on the part of the lessee, his executors, administrators, or assigns, ought henceforth to be respectively paid, observed, and performed. AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth (*e*) hereby covenant and agree with the said [*purchaser*], his executors, administrators, and assigns, that notwithstanding any act, deed, matter, or thing whatsoever, made or done, or permitted to be made or done to the contrary by the said [*vendor*], the hereinbefore recited indenture of lease of the —— day of —— is a good, valid, and subsisting lease in the law for the premises thereby demised, and is still in full force for all the residue now unexpired of the said term of —— years thereby granted; And that the yearly rent of £—— thereby reserved, and all the covenants, conditions, and agreements, contained in the said indenture, and on the part of the said lessee, his executors, administrators, or assigns to be observed and performed, have been respectively

Habendum to the purchaser for the residue of the term, &c.

Covenants by vendor;

—that, notwithstanding any act by him, lease is valid;

† "them the said [*vendors*] respectively."

(*e*) "AND the said [*one vendor*], so far only as concerns one undivided moiety or equal half part of the —— and premises intended to be hereby assigned, and the acts, deeds, and defaults of the said [*one vendor*], and of those claiming under him; and the said [*other vendor*], so far only as concerns the other undivided moiety or equal half part of the said —— and premises, and the acts, deeds, and defaults of the said [*other vendor*], and of those claiming under him, do hereby, for themselves respectively, and for their respective heirs, executors, and administrators, covenant, &c."

Variation where covenants are by two tenants in common.

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duly paid, observed, and performed, up to the day of the date of these presents; And that, notwithstanding any such act, deed, matter, or thing as aforesaid, the said [*vendor*] † now hath in himself good right and absolute authority by these presents to assign or otherwise assure the said —— and premises intended to be hereby assigned, with the appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, for all the residue which is now unexpired of the said term of —— years, in manner aforesaid, according to the true intent and meaning of these presents; *And further*, that, subject to the payment of the rent, and the observance and performance of the covenants, conditions, and agreements respectively reserved and contained by and in the said indenture of lease, it shall be lawful for the said [*purchaser*], his executors, administrators, and assigns, henceforth, at all times hereafter, during the continuance of the said term of —— years, peaceably and quietly to enter into and upon, and hold and enjoy the said premises, with the appurtenances, and to take the rents and profits thereof, to and for his and their own use, without any eviction, interruption, or denial whatsoever from or by the said [*vendor*] ‡, or any person or persons whomsoever having, or rightfully claiming, or to claim any estate, right, title, or interest at law or in equity, in, to, or out of the same premises, or any part thereof, from, through, under, or in trust for him §; *And also*, that the said premises are free and discharged, or by the said [*vendor*] ‖, his heirs, executors, or administrators, shall be effectually kept indemnified from and against all former estates, rights, titles, charges, and incumbrances whatsoever, at any time or times heretofore made, created, or occasioned by the said [*vendor*] ††, or any person or persons claiming or to claim through, under, or in trust for him ‡‡; *And lastly*, that the said [*vendor*], his §§ executors or administrators, and every

—and that he hath power to assign;

—and for quiet enjoyment,

—free from incumbrances;

—and for further assurance.

† "[*vendors*] now have in themselves, or one of them now hath, &c."

‡ "[*vendors*] respectively,"

§ "them or either of them;"

‖ "[*vendors*] or one of them, or the heirs, executors, or administrators of them, or of one of them,"

†† "[*vendors*], or either of them,"

‡‡ "them respectively;"

§§ "[*vendors*] respectively, and their respective"

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person whosoever having, or rightfully claiming or to claim any estate, right, title, or interest, at law or in equity, in, to, or out of the said premises, or any part thereof, through, under, or in trust for him or them†, will, from time to time, and at all times hereafter, upon every reasonable request in writing, and at the costs and charges of the said [*purchaser*], his executors, administrators, or assigns, make, do, or execute, and perfect every such lawful and reasonable act, deed, assignment, or assurance in the law whatsoever, for more effectually or satisfactorily assigning or otherwise assuring the said premises intended to be hereby assigned, with the appurtenances, unto the said [*purchaser*], his executors, administrators, or assigns, thenceforth for all the residue or remainder which shall be then unexpired of the said term of —— years, in manner aforesaid, according to the true intent and meaning of these presents, as by the said [*purchaser*], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised and required, [so as such further assurances, or any of them, shall not contain in them, or imply, any other or more general covenant or warranty than against the acts, deeds, or defaults of the person or persons who shall be required to make or execute the same; and so as such person or persons shall not be compellable to go from his, her, or their usual place or places of abode](*f*). And the said [*purchaser*], for himself, his heirs, executors, administrators, and assigns, *Doth* hereby covenant and agree with the said [*vendor*], his heirs, executors, and administrators, that the said [*purchaser*], his heirs, executors, administrators, or assigns, will, from time to time, duly pay the said rent of £——, and observe and perform the several covenants, conditions, and agreements respectively reserved and contained by and in the hereinbefore recited indenture of lease of the —— day of ——, on the part of the lessee, his executors, administrators, or assigns, henceforth to be paid, observed, and performed; *And also*, that the said [*purchaser*],

Covenant by purchaser to pay the rent, and perform the covenants of the lease.

† "them respectively,"

It is incorrect, where the vendor's covenants only extend to the acts of himself, and of persons claiming under *him*, to except the rent and covenants in the lease—at all events, if the covenantor be not the original lessee.

(*f*) As to this *professed* qualification of the covenant, vide ante, p. 77.

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his heirs, executors, administrators, or assigns, will, from time to time, and at all times hereafter, effectually keep indemnified the said [*vendor*], his† heirs, executors, and administrators, from all actions, suits, and other proceedings which shall be commenced or prosecuted against the said [*vendor*], his‡ heirs, executors, or administrators, and all costs, losses, damages, and expenses which he or they shall respectively incur or suffer by reason of the non-payment of the said rent, or the non-observance or non-performance of the said covenants, conditions, and agreements, or any of them, or by reason of any other matter or thing in anywise relating thereto (*g*). IN WITNESS whereof the said [*vendor*],

Testimonium: Execution by attorney.

† "[*vendors*] respectively, and their respective"

‡ "[*vendors*], or either of them, or the heirs, executors, or administrators of them, or of either of them;"

Purchaser of leasehold bound to indemnify vendor from the rent and covenants.

(*g*) Without any express stipulation, the purchaser of a leasehold estate is bound to enter into a covenant with the vendor to indemnify him against the rent and covenants of the lease; see *Pember* v. *Mathers*, 1 B. C. C. 52; and it is immaterial whether the vendor stand in the situation of lessee or assignee; for though, in the latter case, he is only bound by the covenants during the continuance of his ownership, and is, therefore, discharged from his liability *to the lessor* by the assignment, yet it is probable that he has entered into a covenant with the person from whom he purchased, whether lessee or assignee, to pay the rent and perform the covenants; and against this covenant (from which he is not released by his assignment) he is entitled to an indemnity. And the circumstance that the sale is made by an executor or administrator, from whom the purchaser can have no covenants of title, does not vary the rule. *Staines* v. *Morris*, 1 Ves. & Bea. 8. [Vide ante, Vol. 4, p. 435: *Cochrane* v. *Robinson*, 11 Sim. 378. But a *trustee* for sale of leaseholds is not perhaps entitled to require an indemnity when the sale is not made for the benefit of the party who assigned to him; for to insist on that would be, to depreciate the property for the benefit of a stranger to the trust. See *Wilkins* v. *Fry*, 1 Meriv. 365, 367. And it may be laid down that] the requisition of a covenant of indemnity, in general, can only be supported where the vendor is liable to be damnified by the non-performance of the covenants. If, therefore, the sale is by the assignee of a bankrupt, inasmuch as such assignee is not liable to the covenants of the lease after assignment, nor to any covenant of indemnity the bankrupt may have entered into, he cannot exact a covenant of indemnity from the purchaser; and, it seems, he has no right as against the purchaser, without express stipulation, to require, and he ought not, as against the creditors, to prejudice the sale by stipulating for, an indemnity to the bankrupt against any risk *he* may continue to be exposed to.

Remarks upon

In *Wilkins* v. *Fry*, it was held that the assignees of a bankrupt

by [*attorney*], of &c., his attorney lawfully authorized in that behalf by a power of attorney under the hand and seal of

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could not insist on covenants for the indemnity of the bankrupt. The bankrupt act, 6 Geo. 4, c. 16, s. 75, exempts a bankrupt lessee from the covenants in the lease after its acceptance by the assignees; (vide ante, Vol. 4, p. 429); but as the act does not exonerate a bankrupt from covenants of indemnity entered into by him as assignee of a lease, (ante, Vol. 4, p. 172), a case may yet exist, calling for the application of the principle. The result is, to give to purchasers of leaseholds from assignees of bankrupts an advantage of no small value, and which, let it be observed, is not confined to the immediate purchaser under the bankruptcy, but extends to all subsequent assignees of the lease; for, when once an assignment is made by a person who is under no liability extending beyond his ownership, of course an indemnity from the assignee cannot be required. By parity of reasoning, the latter, on his parting with *his* interest, would be in a similar situation, and thus the necessity for any further security from assignee to assignor is at an end.

Wilkins v. *Fry*.

Advantage of purchasing leaseholds from assignees in bankruptcy.

[The indemnity which the vendor in ordinary cases is entitled to, appears to be such as will completely exonerate him from all liability for the future, after his assignee may have parted with the lease, as well as during his enjoyment. See *Lekeux* v. *Nash*, 2 Str. 1221. In the language of Lord *Thurlow*, in *Pember* v. *Mathers*, the estate being sold out and out, the vendor expects to have no more connexion with the original lessor. The covenant which, in *Staines* v. *Morris*, 1 Ves. & B. 8, it was held that the purchaser was bound to give to the vendors, who were executors of an assignee who had bound himself to indemnify the original lessee, was in these words, "That he the said T. H., his heirs, executors, administrators, or assigns, shall and will well and truly pay, perform, fulfil, and keep the rents, covenants, and agreements, in and by the said indenture of lease reserved and contained on the lessee's part to be paid &c. for or in respect of the premises hereby assigned, or any part thereof, from and after the 25th day of December instant, for and during the remainder of the said term of 57 years."]

As to indemnifying assignor of lease in ordinary cases.

[It deserves consideration whether the rule which has been just discussed, is not inconsistent with the order made by Lord *Langdale*, and approved by Lord *Cottenham*, in the case of *Rowley* v. *Adams*, 4 Myl. & Cr. 534. There the executors of a party who had taken an assignment of a lease, but who had not bound himself by any express or implied covenant to indemnify the lessee beyond the period of his own enjoyment, were directed by the court to take such steps as might be necessary to relieve their testator's estate from all liability in respect of the lease, which was very disadvantageous, or, in plain terms, to assign it to a pauper. Now, the cases above referred to have settled that it is the duty of the purchaser of a lease to exonerate his vendor from all future liability, and that he may be required to covenant to do so; how then can the Court, merely because the vendor has neglected to fortify his inherent equity by the legal remedies which a covenant of indemnity would give him, declare it to be the duty of those who represent his assignee's estate, to throw upon him that very liability which it

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the said [*vendor*], bearing date, &c., (an attested copy whereof is hereunto annexed), hath hereunto set his name and seal the day and year first above written.

Signed, sealed, and delivered by the within-named [*vendor*], by [*attorney*], as his attorney, in the presence of &c.

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declares he ought to be relieved from? The principle established by the cases of *Hallett* v. *Middleton*, 1 Russ. 243: *Fain* v. *Ayres*, 2 Sim. & St. 533, &c., that a purchaser who has neglected, at the time of taking his conveyance, to require such evidence and covenants for the production of evidence, as, prior to the completion of the sale, he would be entitled to insist on, cannot afterwards compel the vendor to furnish such evidence or enter into such covenants, unless in performance of an express agreement entered into at the time of selling, (*Pember* v. *Mathers*, 1 Br. C. C. 52), could not, it is conceived, be urged in support of the doctrine in *Rowley* v. *Adams*. The right to any legal security is gone as soon as the legal conveyance is completed without such security; but the equity, which arose out of the relative situations of the parties, cannot, it is submitted, be prejudiced by the neglect of those parties to fortify it by a legal security, and least of all can it be the duty of a court of equity to do that in favour of a mere volunteer. The vendor having executed the assignment of his lease without taking the covenant of indemnity which he might have insisted on, has waived his right to that legal remedy, but that right was a mere incident to the general equity which arose out of the permanent relation of the parties as assignor and assignee, and not out of their temporary relation as vendor and purchaser disputing about specific performance.]

Words in the habendum "subject to the rent and covenants," held not to create a covenant.

Where it is intended that the purchaser of the lease shall not contract any positive engagement to pay the rent and perform the covenants, it has been advised that the assignment should not be declared to be made subject to such an obligation, expressions to this effect having been held to amount to an express covenant. [But where A., lessee for years, sold the property for a pecuniary consideration to B., on which occasion A. and B. executed an indenture, by which the premises were assigned by A. to B. for the residue of the term, *subject to the payment of the rent and performance of the covenants reserved and contained in the lease;* B. subsequently sold and assigned the term to C., who neglecting to pay the rent, the same was paid by A., the lessee, who thereupon brought an action of covenant against B., his assignee, and was held (reversing the decision of the Court of C. P.) not to be entitled to recover, as the words in question did not import an engagement by the assignee to perform the covenants contained in the original lease. *Steward* v. *Wolveridge*, 2 Moo. & Sc. 75; 3 Id. 561; 1 Cr. & Mee. 644. See 4 Myl. & Cr. 540, and ante, Vol. 4, pp. 172, 387.]

Assignee bound to pay rent and perform covenants during his ownership.

But even where the assignee of a lease has not entered into an express covenant, he is bound to indemnify the assignor against breaches of covenant committed while the estate continues vested in him as assignee, if such be the tenor of the instrument under which his title is derived. Thus, where on the sale

20. ASSIGNMENT OF LEASEHOLDS.

Burnett v. *Lynch.*

of a leasehold property the vendor (who was the original lessee) by *deed poll* assigned the term to the purchaser, subject to the payment of the rent, and the performance of the covenants reserved and contained in the lease; the purchaser entered, and during his ownership the lessee was obliged by the lessor to pay damages for a breach of covenant. The present was an action on the case by the lessee against his assignee, and it was held by the Court that the action was well brought. Lord *Tenterden*, C. J., said, "I think an action of covenant is not maintainable, for an action of covenant is of a technical nature. It cannot be maintained, except against a person who by himself, or some other person acting on his behalf, has executed a deed under seal; or who (under some very peculiar circumstances, such as those mentioned in Co. Litt. 231. a.) has agreed by deed to do a certain thing. Here, the defendant has not engaged by deed to perform the covenants, and consequently covenant will not lie. Then, will an action of assumpsit lie? I think it would—but why? Because the defendant has, by taking the estate subject to the payment of the rent, and the performance of the covenants in the original lease, thereby made it his duty to pay the rent and perform the covenants; and if by neglecting that duty a burden is cast upon the person from whom he took the estate, it seems to me that the law will imply a promise as arising out of that duty, and in that case the action of assumpsit will lie; but it by no means follows that, because a promise may be implied by law, this action on the case, which is in terms founded on the breach of that duty from which the law implies a promise, may not also be maintainable. I think that a duty did arise when the defendant accepted the assignment of the lease, subject to the performance of the covenants; and that, as a breach of that duty has been committed, a special action on the case may be maintained." *Burnett* v. *Lynch*, 5 B. & Cr. 589.

Covenant.

Assumpsit.

Case.

The doctrine of the case, it will be observed, does not supersede the necessity of an express covenant by an assignee to pay the rent and perform the covenants; because it is now settled that the assignee's liability, incident to the implied contract, is confined, both at law and (according to *Rowley* v. *Adams*) in equity, to the period of his ownership. [Vide ante, Vol. 4, pp. 171, 388; Vol. 5, p. 429.]

21. ASSIGNMENT of PART of the PREMISES comprised in a LEASE.

21. ASSIGNMENT *of* PART *of the* PREMISES *comprised in a* LEASE (*the Remainder being retained by the Vendor*); MUTUAL COVENANTS *by Vendor and Purchaser to* PAY *their respective* PROPORTIONS *of* RENT, *&c.* (*a*); *by Vendor to* PRODUCE LEASE; *by Purchaser* NOT *to* ERECT BUILDINGS.

Parties. THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part: WHEREAS (*recite lease of a messuage and two stables, ut ante, p.* 167): AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the said two stables, (being part of the premises comprised in the said indenture of lease), for the residue of the said term, at the price of £——; and upon the treaty for the said purchase it was agreed that the said [*purchaser*], his executors, administrators, and assigns should pay the yearly rent of £——, in respect of the said two stables, as his proportion of the said yearly rent of £——, and that the residue of the said yearly rent of £—— should be paid by the said [*vendor*], his executors, administrators, and assigns, in respect of the said demised dwelling-house and premises not intended to be hereby assigned, and that the said parties respectively should enter into the several covenants and agreements hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said

Recital of lease.

—of contract for purchase.

—of agreement to apportion rent.

Testatum.

As to power of distress.

(*a*) This precedent does not go on to give cross powers of distress, which is the most efficient mode of carrying into effect an arrangement of this nature; but which is frequently effected by a separate deed, of which a precedent has already been given. (Vide Vol. 4, p. 202; see also, observations, ante, p. 17.) If it be deemed advisable to insert such powers in the present deed, the precedent referred to will furnish the requisite information. It might be convenient for the purchaser, that his power of distress should be inserted in the present deed, as it would render a further instrument unnecessary; but if it also contains the assignor's power of distress, a counterpart of the deed should be delivered to him. In the present case, also, the assignor ought to have a counterpart.

21. ASSIGNMENT OF PART OF THE PREMISES COMPRISED IN A LEASE.

agreement, and in consideration of the sum of £—— of lawful British money paid by the said [*purchaser*] to the said [*vendor*], at or before the execution of these presents, the receipt of which sum of £—— he the said [*vendor*] doth hereby acknowledge, and of and from the same doth hereby acquit, release, and for ever discharge the said [*purchaser*], his executors, administrators, and assigns, He the said [*vendor*] *Doth* by these presents grant, bargain, sell, assign, and set over, unto the said [*purchaser*], his executors, administrators, and assigns, ALL THOSE the said two stables hereinbefore described and comprised in and demised by the hereinbefore-recited indenture of lease, with their appurtenances, and which premises are now in the occupation of the said [*purchaser*] (*b*); Together with all the benefit and advantage of the said indenture of lease, and of the lessor's covenants therein contained, so far as the same relate to or concern the said two stables and premises hereby assigned (*c*): *And* all the estate, right, title, interest, term of years to come or unexpired, benefit of renewal, property, claim, and demand whatsoever, both at law and in equity, of him the said [*vendor*], in and to the said two stables and premises hereby assigned. TO HAVE AND TO HOLD the said two stables, and all and singular other the premises hereby assigned, with their appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, henceforth, during all the residue and remainder now to come and unexpired of the said term of —— years in and by the said indenture of lease granted, and for all other the estate, term, and interest (if any) of the said [*vendor*] therein: subject, nevertheless, to the payment of the said yearly rent of £—— quarterly to the said [*lessor*], his heirs or assigns, on or at the days and times and in the manner on, at, and in which the whole rent reserved by the said indenture of lease is made payable; and also subject to the covenants, conditions, and agreements contained in the said indenture of lease, and which so far only as relate to the said two

vendor assigns.

Premises.

General words.

Habendum.

Subject to proportion of rents and covenants.

(*b*) If an underlease has been granted by the vendor, it should be noticed here, and the benefit of the covenants, and the counterpart, should be granted in the usual manner. It should also be excepted out of the covenant against incumbrances, &c.

Reference to underlease.

(*c*) If there has been an underlease, add—

"and the whole and exclusive benefit of the said underlease."

21. ASSIGNMENT OF PART OF THE PREMISES COMPRISED IN A LEASE.

stables and premises hereby assigned, with their appurtenances, are and ought henceforth (*d*) to be observed and performed. AND the said [*vendor*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his executors, administrators, and assigns, in manner following, that is to say, That, notwithstanding any act, deed, matter, or thing made, done, or committed to the contrary by him the said [*vendor*], the said indenture of lease, at the time of the execution of these presents, is a good and effectual lease, valid in the law, of and for the said two stables and premises hereby assigned, with their appurtenances, for the term thereby demised, and is in nowise surrendered, forfeited, or become void or voidable; and that the rent in or by the said indenture of lease reserved, and the land tax, sewers' rate, and all other taxes, rates, and assessments whatsoever, chargeable upon the tenant or lessee of the said two stables and premises hereby assigned, have been well and truly paid and discharged up to and inclusively of the day of the date hereof (*e*); And that the covenants and agreements contained in the said indenture of lease, on the part of the tenant or lessee, have been well and truly observed and performed up to and inclusively of the date of these presents (*f*); *And also,* that he the said [*vendor*], his executors, administrators, or assigns, will or shall henceforth, and at all times hereafter (*g*) well and truly pay the said yearly rent of £—— [*vendor's proportion of rent*], so agreed to be paid by him and them in respect of the said demised dwelling-house and premises not hereby assigned, and also well and truly perform and observe the covenants, conditions, and agreements in the said inden-

Covenants by vendor:

—that the lease is valid;

—that rent and taxes have been paid,

and covenants performed;

—that vendor will pay apportioned rent,

(*d*) *Or* "from the —— day of —— last." *Or* "from the —— day of —— next."

(*e*) *Or* "the said —— day of —— last." *Or* "shall be well and truly paid and discharged by him the said [*vendor*], his executors, administrators, or assigns, up to and inclusively of the said —— day of —— next."

(*f*) *Or* "the said —— day of —— last." *Or* "shall be well and truly observed and performed up to and inclusively of the said —— day of —— next."

(*g*) *Or* "from the —— day of —— next." *Or* "from the —— day of —— last, and at all times thereafter."

21. ASSIGNMENT OF PART OF THE PREMISES COMPRISED IN A LEASE.

ture of lease contained on the part of the tenant or lessee to be performed and observed, so far only as the same relate to the said dwelling-house and premises; *And also* that he the said [*vendor*], his heirs, executors, or administrators, will or shall effectually save harmless and keep indemnified the said [*purchaser*], his heirs, executors, administrators, and assigns, of and from all evictions, ejectments, distresses, suits at law and in equity, costs, losses, charges, damages, and expenses whatsoever, by reason of the non-payment of the said rent of £——, or the non-performance of all or any of the covenants, conditions, and agreements contained in the said indenture of lease, so far as the same covenants, conditions, and agreements relate to or concern the messuage and premises comprised in the same indenture of lease, and not hereby assigned; *And also*, that he the said [*vendor*], his executors, administrators, or assigns, will or shall, from time to time, and at all times hereafter, unless prevented by fire or any other inevitable accident, upon every reasonable request in writing, and at the costs of the said [*purchaser*], his executors, administrators, or assigns, produce and shew forth to the said [*purchaser*], his executors, administrators, or assigns, or to such person or persons as he or they shall direct, as occasion shall require, the hereinbefore-recited indenture of lease; And also will and shall, at the like request and costs, deliver to him or them a copy or abstract of the same indenture, or of any part or parts thereof, for the manifestation or support of the title or possession of the said [*purchaser*], his executors, administrators, and assigns, of, in, or to all or any part of the said two stables and premises hereby assigned; and, if required, will or shall permit such copy or abstract to be examined with the original; *And that*, notwithstanding any such act, deed, matter, or thing as aforesaid, he the said [*vendor*] now hath in himself good right, full power, and lawful and absolute authority to assign or otherwise assure the said two stables and premises intended to be hereby assigned, unto the said [*purchaser*], his executors, administrators, and assigns, during the residue now unexpired of the said term of —— years, in manner aforesaid, and according to the true intent and meaning of these presents; *And further*, that he the said [*purchaser*], his executors, administrators, and assigns, shall, and lawfully may, from time to time and at all times hereafter, during the residue and remainder of the said term of —— years granted by the said indenture of lease,

and indemnify purchaser therefrom;

and produce lease;

and deliver copies;

—that vendor has good right to assign;

—for peaceable enjoyment;

21. ASSIGNMENT OF PART OF THE PREMISES COMPRISED IN A LEASE.

peaceably and quietly hold, occupy, possess, and enjoy the said two stables and premises, and receive and take to his and their own use and benefit the rents and profits thereof, without any interruption or denial from or by the said [*vendor*], his executors or administrators; *And that*, free and clear, and freely and clearly discharged, or by him the said [*vendor*], his heirs, executors, or administrators effectually kept indemnified, of, from, and against all manner of incumbrances whatsoever, made, created, or suffered by the said [*vendor*], his executors or administrators, or any other person or persons lawfully claiming by, from, through, under, or in trust for him or them; *And moreover* that he the said [*vendor*], and his executors and administrators, and all persons whosoever lawfully claiming by, from, through, under, or in trust for him or them, will or shall, from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said [*purchaser*], his executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and executed, all such further acts, deeds, assignments, and assurances in the law whatsoever, for the more effectually assigning or otherwise assuring the said two stables and premises intended to be hereby assigned unto the said [*purchaser*], his executors, administrators, and assigns, during all the residue which shall be then unexpired of the said term of —— years, according to the true intent and meaning of these presents, as by the said [*purchaser*], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised and required. AND the said [*purchaser*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*vendor*], his heirs, executors, and administrators, in manner following, (that is to say), That he the said [*purchaser*], his executors, administrators, or assigns, will or shall, from time to time, and at all times hereafter (*h*), well and truly pay the said yearly rent of £——, so agreed to be paid by him and them in respect of the said two stables and premises hereby assigned; And also well and truly perform and observe the covenants, conditions, and agreements, in the said indenture of lease, contained on

—free from incumbrances.

—for further assurance.

Covenant by the purchaser to pay and perform his proportion of the rent and covenants;

and to indemnify the vendor therefrom;

(*h*) *Or* "from the said —— day of —— last." *Or* "from the said —— day of —— next."

the part of the tenant or lessee to be performed and observed, so far only as the same relate to the said two stables and premises hereby assigned; And also, that the said [*purchaser*], his executors, administrators, or assigns, will or shall, from time to time, and at all times hereafter, effectually save harmless, and keep indemnified the said [*vendor*], his heirs, executors, and administrators, of and from all evictions, ejectments, suits at law and in equity, distresses, costs, losses, charges, damages, and expenses whatsoever, by reason of the non-payment of the said rent of £——, or of the non-performance of all or any of the said covenants, conditions, and agreements relating to the said hereby-assigned premises; *And also* that he the said [*purchaser*], his executors, administrators, or assigns will not nor shall at any time hereafter during the residue of the said term of —— years, make, erect, or set up any buildings, wall, partitions, or other erections on the premises hereby assigned, so as to obstruct or diminish the light or air of the said demised dwelling-house and premises not hereby assigned, as the same light and air are now enjoyed by the occupiers thereof, or so as to raise the height or widen the ground plan of the said two stables hereby assigned, or intended so to be, or any part thereof. IN WITNESS, &c.

21. ASSIGNMENT OF PART OF THE PREMISES COMPRISED IN A LEASE.

Not to erect buildings so as to obstruct the light of the assignor's dwelling-house.

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22. ASSIGNMENT *of a* LEASE *with the* CONSENT *of the* LESSORS, *where the* ASSIGNEE COVENANTS *with the* LESSORS *to pay the* RENTS, *and* PERFORM *the* COVENANTS; *with a* REVIVAL *of the* CONDITION FOR RE-ENTRY *on Breach of Covenants, which was waived by the License* (*a*). (*Variation where the* CONSIDERATION *for the Assignment is the* TRANSFER *of* STOCK (*b*)).

22. ASSIGNMENT OF LEASEHOLD, WITH CONSENT OF LESSOR.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; the master, war-

Parties.

(*a*) As to this doctrine, vide ante, Vol. 3, p. 685; Vol. 4, p. 375.

(*b*) If this variation is adopted, the deed will be liable only to a common deed stamp of 1*l.* 15*s.* It is remarkable that the Stamp Act,

Ad valorem duty not pay-

22. ASSIGNMENT OF LEASEHOLD, WITH CONSENT OF LESSOR.

Recital of lease.

dens, and society of the mystery of Bowyers, of the city of London, of the second part; and [*purchaser*], of &c., of the third part. WHEREAS, by indenture, bearing date on or about the —— day of ——, and made between the master, wardens, and society of the mystery of Bowyers, of the one part; and the said [*vendor*], of the other part; the said master, wardens, and society did demise and lease unto the said [*vendor*], his executors and administrators, ALL THAT, &c., (*describe parcels*): *To hold* the same, with their appurtenances, unto the said [*vendor*], his executors, administrators, and assigns, from ——, the —— day of —— then next, for the term of twenty-one years thence ensuing, at or under the yearly rent of £——, payable quarterly, as therein mentioned; And also, at or under the further yearly rent or sum of £—— an acre, and so in proportion for any less quantity, of grass ground which the said [*vendor*], his executors, administrators, or assigns, should plough or convert into tillage; and subject to the several covenants therein contained on the part of the said [*vendor*], his executors, administrators, and assigns, to be performed; and in particular,

— of covenant not to assign or underlet.

subject to a covenant that he the said [*vendor*], his executors, administrators, or assigns, would not nor should at any time or times, during the term thereby granted, demise, assign, or dispose of the thereby demised premises, or any part thereof, or part with the possession of the same, for all or any part of the term thereby granted, to any person or persons whomsoever, without the consent of the said master, wardens, and society, or their successors, in writing, under their common and usual seal, first obtained. AND WHEREAS

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able in respect of a stock consideration.

55 Geo. 3, c. 184, (vide ante, Vol. 8), has not charged with ad valorem duty conveyances on sales in consideration of stock; by the acceptance of which, therefore, instead of money, the duty is avoided. In fact, the deed operates merely in the nature of an exchange, the estate being conveyed in consideration of the stock being transferred; and though the latter happens to be always convertible into money at the market price of the day, yet this does not change its character of being something different from money, as is shewn, if evidence be wanting, by the case of *Cumberland* v. *Kelly*, 3 B. & Ad. 607, where it was held that a grant of an annuity, in consideration of a transfer of stock in the funds, did not require enrolment under the stat. 17 Geo. 3, c. 26, which extended only to annuities granted for a pecuniary consideration, and not, (as the subsequent stat. of 55 Geo. 3, c. 141, now in force) to annuities in consideration of money, or *money's worth*.

22. ASSIGNMENT OF LEASEHOLD, WITH CONSENT OF LESSOR.

—of contract for purchase, and agreement of lessors to grant license.

the said [*vendor*] hath contracted with the said [*purchaser*] for the sale to him of the said leasehold hereditaments and premises for the price of £——(*c*). AND WHEREAS the said [*vendor*] hath applied to and requested the said master, wardens, and society of the mystery of Bowyers, to grant unto him their license and consent under their common and usual seal, to assign the said premises for all the residue of the said term of twenty-one years, unto the said [*purchaser*], which they have consented to do, on the said [*purchaser*] executing to them such covenant and grant as hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, and also in consideration of the sum of £—— sterling by the said [*purchaser*] to the said [*vendor*] already paid, the receipt whereof is hereby acknowledged (*d*), he the said [*vendor*], by and with the license and consent of the said master, wardens, and society of the mystery of Bowyers, (testified by this deed or writing under their common and usual seal), *Doth* by these presents bargain, sell, assign, and transfer unto the said [*purchaser*], his executors, administrators, and assigns, *All* and singular the hereditaments and premises hereinbefore described, and all other the premises demised by the said indenture of lease of the —— day of ——, as aforesaid, with their appurtenances; *And* all the estate, &c.: TO HAVE AND TO HOLD the said hereditaments and other the premises hereinbefore expressed to be hereby

Testatum.

In consideration, &c., vendor, with the consent of the lessors, assigns the premises to the purchaser.

Habendum.

(*c*) If the consideration is the transfer of stock, substitute for the recital of the contract for sale, the following:—

"AND WHEREAS the said [*vendor*] hath contracted with the said [*purchaser*] to assign to him the said leasehold hereditaments and premises in consideration of £—— 3*l.* per centum Consolidated Annuities, being transferred by the said [*vendor*] to the said [*purchaser*]."

Variation where the consideration is the transfer of stock.

(*d*) If the consideration is stock, say—

"In consideration of the said £——3*l.* per centum Consolidated Annuities transferred by the said [*vendor*] to the said [*purchaser*] in the books of the Governor and Company of the Bank of England, at or immediately before the execution of these presents, the transfer of which £——3*l.* per centum Annuities the said [*vendor*] doth hereby acknowledge, and therefrom doth acquit and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns."

Variation where the consideration is the transfer of stock.

22. ASSIGNMENT OF LEASEHOLD, WITH CONSENT OF LESSOR.

assigned, with their appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, henceforth during all the residue now unexpired of the term of twenty-one years, granted by the said indenture of lease as aforesaid, and for all other the term of the said [*vendor*] therein; subject to the payment of the rents and to the performance of the covenants by and in the said indenture of lease reserved and contained, and which, on the part of the said [*vendor*], his executors, administrators, and assigns, are or ought, from the —— day of —— last, to be paid and performed. AND the said [*purchaser*] for himself, his heirs, executors, and administrators, doth hereby covenant with the said master, wardens, and society, their successors and assigns, that he the said [*purchaser*] will not nor shall his executors, administrators, or assigns, at any time or times during the term granted by the said indenture, demise, assign, or dispose of the premises demised by the said indenture of lease, or any part thereof, or part with the possession of all or any part or parcel of the same premises, for all or any part of the said term of twenty-one years, unto any person or persons whomsoever, without the license and consent of the said master, wardens, and society, or their successors, in writing, under their common and usual seal, first had and obtained; *And also*, that he the said [*purchaser*], his executors, administrators, or assigns, will and shall from time to time, during the residue now unexpired of the term hereby assigned, well and truly observe and perform all and singular other the covenants contained in the said indenture of lease on the part of the said [*vendor*], his executors, administrators, or assigns, to be observed and performed: (*Covenants by the vendor for the title, ut ante, p.* 169: *covenant by the assignee to pay rents, &c., ut ante, p.* 171): *Provided always*, and it is hereby declared and agreed, and particularly the said [*purchaser*] doth hereby grant and declare unto the said master, wardens, and society, their successors and assigns, that if it should happen that the said yearly rent or sum of £——, or any part thereof, or the said additional or increased rent, (in case the same additional or increased rent should ever become payable), or any part thereof, should be unpaid in the whole or in part by the space of twenty-one days next over or after any or either of the days or times on which the same are respectively reserved and made payable in and by the said indenture of lease, or if the said [*purchaser*], his executors, administrators, or as-

Purchaser covenants with the lessors not to assign, &c.,

—and to perform the covenants.

Proviso for reentry on nonpayment of rent, or on assigning, or on breach of covenants.

22. ASSIGNMENT OF LEASEHOLD, WITH CONSENT OF LESSOR.

signs, should at any time or times during the term hereby assigned, demise, assign, or dispose of the hereby-assigned premises, or any part thereof, or part with the possession of all or any part of the same premises, for all or any part of the term hereby assigned, unto any person or persons whomsoever, without the license and consent of the said master, wardens, and society, or their successors, in writing, under their common and usual seal, first had and obtained: or (*e*) if the said [*purchaser*], his executors, administrators, or assigns, should not in all things well and truly perform and observe all and every the covenants and conditions in the said indenture of lease contained, on the part of the said [*vendor*], his executors, administrators, and assigns, to be performed and observed, according to the true intent and meaning of the same indenture of lease; Then, and in every or any of the said cases, it shall be lawful for the said master, wardens, and society, their successors or assigns, into and upon the hereby-assigned premises, or any part thereof in the name of the whole, wholly to re-enter, and the same and every part thereof, with the appurtenances, to re-possess and enjoy as in their former estate, anything herein contained to the contrary notwithstanding. IN WITNESS, &c.

(*e*) The license to assign, it is commonly thought, dispenses with the condition as to *all* the covenants; but no case has gone so far: and the objection which has been shewn to exist to the doctrine of *Dumpor's case* may produce a doubt whether it would be carried beyond the strict letter of the authorities, *i. e.* as vacating the proviso against assignment. Vide ante, Vol. 4, p. 377, n.

Principle of the doctrine of *Dumpor's case.*

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23. SURRENDER *by* VENDOR *to the Use of* PURCHASER, *out of Court, of* COPYHOLD.

23. SURRENDER OF COPYHOLD OUT OF COURT.

The manor of ——, *in the county of* ——. } BE IT REMEMBERED, that, on the —— day of ——, in the year of our Lord ——, [*vendor*], of &c., gentleman (*a*),

(*a*) If the vendor's wife is a party, vary the precedent, ut ante, Vol. 6, p. 17.

23. SURRENDER OF COPYHOLD OUT OF COURT.

one of the customary tenants of the manor aforesaid, came before [*steward*], of &c., esquire, steward of the said manor, and, in consideration of the sum of £—— to him the said [*vendor*] paid by the said [*purchaser*], of &c., did, out of court, surrender into the hands of the lord of the said manor, by the rod, by the hands and acceptance of the said steward, according to the custom of the same manor, ALL THAT copyhold messuage, &c., (*describe parcels*), with the appurtenances to the said premises belonging; (of which premises the said [*vendor*] was admitted tenant at a general court held for the said manor on the —— day of ——); And the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; And all the estate, right, title, interest, trust, property, claim, and demand whatsoever, of the said [*vendor*], in, to, of, and upon the said premises; To the uses following (*b*), (that is to say), TO SUCH USES, for such estates, upon such trusts, and to and for such intents and purposes as the said [*purchaser*] by any deed or deeds duly executed, or by his last will and testament, shall at any time or times or from time to time revocably or irrevocably appoint, and in default of and subject to any such appointment, TO THE USE and behoof of the said [*purchaser*], his heirs and

Parcels.

Uses.

Expediency of giving a power of appointment to surrenderee of copyholds.

(*b*) The lord of a manor cannot insist on a surrenderee being admitted, the tenancy not being thereby rendered vacant, as the surrenderor continues to be tenant; indeed, in the case of surrenders made as a security for money, the practice, it is well known, is, for the conditional surrenderee not to be admitted. On a purchase, however, the ordinary course is otherwise, the surrenderee generally procures himself to be admitted forthwith, chiefly because, until this act, he is unable to surrender. This occasion, however, for the proceeding, may be avoided by reserving to the surrenderee a power of appointment (as in the text) by the exercise of which he may entitle his appointee to claim admittance without having been himself admitted. *Rex* v. *Oundle*, 1 Ad. & Ell. 253. And by framing the limitations of each successive appointment in a similar manner, the scheme might be carried on for an indefinite period. Where the fine is large or arbitrary, it is probable that this mode of limitation will be generally adopted, and the effect will be, that admission will rarely be applied for, unless where the tenancy becomes vacant by the death of the original surrenderor, when the person for the time being entitled to be admitted under the last deed of appointment must procure himself to be admitted, in order to prevent seizure by the lord; and this he might of course do at any time, if, in the course of any proceedings for the recovery of possession, inconvenience were felt from permitting the estate to remain outstanding in the original surrenderor. Vide ante, Vol. 5, p. 510.

assigns for ever, at the will of the lord, according to the custom of the said manor, at and under the rents and services therefore due and of right accustomed.

23. SURRENDER OF COPYHOLD OUT OF COURT.

(*Signed*) [*Vendor.*]

This surrender was accepted and taken the day and year above written, by me and before me.

[*Steward*], Steward of the Manor.

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24. DEED CONTAINING COVENANTS *of* TITLE (*a*), (*to accompany the last Precedent*).

24. DEED ACCOMPANYING SURRENDER OF COPYHOLD.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—: BETWEEN [*vendor*], of &c., of the one

Parties.

(*a*) As no covenants are inserted on the court rolls, the vendor of copyholds, on surrendering them, frequently executes a contemporaneous deed containing such covenants; which only requires the common deed stamp, the ad valorem duty being upon the surrender. The practice of taking such covenants has only prevailed of late years, and it is still often omitted where the purchase is inconsiderable. Indeed, the advantage which a copyholder has of ascertaining the state of the title, by an examination of the court rolls, more than counterbalances any security to be derived from covenants for title.

As to deeds of covenant accompanying surrenders of copyholds.

One observation, which occurs respecting deeds of covenant relating to copyholds, is, that the possession of them is primâ facie an evidence of unincumbered ownership, which does not belong to the custody of copies of court roll, as the latter may always be obtained from the steward upon application, though a deposit of them has been held to create an equitable mortgage. Vide ante, p. 10; Vol. 5, pp. 109, 234.

Sometimes, instead of making a surrender and executing a deed of covenants, in which the surrender is treated as actually made, the vendor enters into a covenant to surrender, and covenants for the title by the same deed (as in the next precedent); but this is only another mode of effecting the same object, as the surrender is usually made at the same time. Of course, the purchaser will see that the surrender is perfected before he pays his money, as a mere covenant to surrender would give an equitable title only, attended with the dangers incident to such titles; for the vendor might immediately afterwards surrender to another purchaser, who, if he had no notice, could not be deprived by the covenantee-purchaser of the benefit of his legal title. Vide ante, Vol. 5, p. 234.

[It has been doubted whether the covenants for title in a deed executed prior to the surrender (and where the deed assumes the form of a

24. DEED ACCOMPANYING SURRENDER OF COPYHOLD.

part; and [*purchaser*], of &c., of the other part: WHEREAS the said [*purchaser*] lately contracted with the said [*vendor*] for the absolute purchase of the copyhold —— and hereditaments hereinafter described, held of the manor of ——, in the county of ——, and the inheritance thereof in fee-simple, at or for the price or sum of £——, which sum hath, immediately before the execution of these presents, been duly paid by the said [*purchaser*] to the said [*vendor*], and the receipt of which sum he the said [*vendor*] doth hereby acknowledge, and therefrom doth release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns: AND WHEREAS, for the purpose of carrying into effect the said contract, the said [*vendor*] hath this day, in consideration of the said sum of £—— paid to him by the said [*purchaser*] as aforesaid, surrendered, out of court, into the hands of the lord of the said manor, by the acceptance of [*steward*] of &c., esquire, steward of the manor, according to the custom thereof, ALL THAT (*describe parcels*), To the uses and in manner following, (that is to say), To SUCH USES, for such estate or estates, upon such trusts, and to and for such intents and purposes as the said [*purchaser*], by any deed or deeds, or by his last will and testament, should at any time or times or from time to time revocably or irrevocably appoint, and in default of and subject to any such appointment, To THE USE of the said [*purchaser*], his heirs and assigns, for ever, at the will of the lord, according to the custom of the said manor, at and under the rents and services therefore due and of right accustomed: AND WHEREAS, on the treaty for the said purchase, it was agreed that the said [*vendor*] should enter into the covenants hereinafter contained for the title, quiet enjoyment, freedom from incumbrances, and further assurance of the hereditaments so surrendered as aforesaid: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the

Recital of contract for purchase;

—of surrender out of court;

—of agreement to execute present deed.

Testatum.

Whether covenants made prior to surrender run with the land.

covenant to surrender, the purchaser will be estopped in an action on the deed, from asserting that the deed was, in fact, executed after the surrender) would run with the land. In *Riddell* v. *Riddell*, 7 Sim. 529, it was held that at any rate relief could be had in equity upon such covenants; and the Vice-Chancellor was of opinion that the covenants would run with the land at law. As, however, there is no practical advantage in the adoption of a covenant to surrender, it seems to be advisable, in all cases, to take a mere surrender, with a subsequent deed of covenants, as in the text.]

premises, he the said [*vendor*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his heirs, appointees, and assigns, in manner following, (that is to say), That, notwithstanding any act, deed, matter, or thing whatsoever, made, done, or committed, or knowingly suffered to the contrary by the said [*vendor*], he the said [*vendor*], at the time of surrendering the said copyhold ——, hereditaments, and premises, in the manner aforesaid, had in himself full power and lawful and absolute authority to surrender the same, with the appurtenances, *To the uses* aforesaid, according to the true intent and meaning of the above-recited surrender: *And also*, that it shall be lawful for the said [*purchaser*], his appointees, heirs, and assigns, from time to time, and at all times hereafter, under and subject to the rents and services due and of right accustomed for the said copyhold premises, according to the custom of the said manor, to enter into and upon, hold and enjoy the copyhold ——, hereditaments, and premises so surrendered as aforesaid, or intended so to be, with the appurtenances; and to receive and take the rents and profits thereof, without any eviction, interruption, or denial whatsoever, of, from, or by him the said [*vendor*], or his heirs, or any other person or persons whomsoever, lawfully claiming any estate, right, title, trust, or interest in or to the same hereditaments and premises, by, from, through, under, or in trust for him or them: *And that* free and clear and freely and clearly exonerated and discharged, or otherwise by him the said [*vendor*], his heirs, executors, or administrators, effectually saved harmless and kept indemnified from and against all and all manner of former and other estates, titles, charges, and incumbrances whatsoever, at any time or times heretofore, and to be at any time or times hereafter, committed, occasioned, or suffered by the said [*vendor*], or his heirs, or any person or persons lawfully claiming any estate, right, title, or interest in or to the said hereditaments and premises, by, from, through, under, or in trust for him or them, or by his, their, or any of their acts, deeds, means, default, or procurement (*b*): *And moreover*, that he the

24. DEED ACCOMPANYING SURRENDER OF COPYHOLD.

Vendor covenants with purchaser,

that, notwithstanding, &c., he had good right to surrender.

—for quiet enjoyment.

—free from incumbrances.

—and for further assurance.

(*b*) It is incorrect, in this place, to except the manorial rents and services, which, not being created by the act of the vendor, are not within the terms of the covenant.

24. DEED ACCOMPANYING SURRENDER OF COPYHOLD.

said [*vendor*] and his appointees or heirs, and all persons whosoever lawfully claiming any estate, right, title, or interest in or to the said hereditaments and premises, by, from, through, under, or in trust for him or them, will and shall from time to time, and at all times hereafter, upon the request, and at the costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, execute, and perfect all such further and other lawful acts, deeds, surrenders, conveyances, and assurances, in the law whatsoever, for the more effectually surrendering, or otherwise assuring, the said copyhold ——, hereditaments, and premises, to the uses aforesaid, or as he or they shall direct, according to the true intent and meaning of the above-recited surrender, as by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel in the law, shall be reasonably devised and required; so as no such further assurance shall contain or imply any other covenant or warranty on the part of the person or persons who shall be requested to execute the same, than for the acts, deeds, and defaults of himself, herself, and themselves respectively, and his, her, and their heirs, executors, and administrators; [And so as such person or persons shall not be compelled or compellable to go or travel from his, her, or their usual place or respective places of abode]. IN WITNESS, &c.

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25. COVENANT TO SURRENDER COPYHOLD.

25. COVENANT *to* SURRENDER *a* COPYHOLD ESTATE *to a* PURCHASER *in Fee, and* COVENANTS *for* TITLE, &c. (*Variations where the Limitations are to such* USES *as the Purchaser shall* APPOINT, *and in default of Appointment to the Purchaser in* FEE; *and also where certain* SURRENDEREES *who have* NOT *been* ADMITTED RELEASE *to the intended* SURRENDEROR; *and where the Copyholds are held for a* LIFE *or* LIVES).

Parties.

Recital of ven-

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part, and [*purchaser*], of &c., of the other part: WHEREAS the said [*vendor*] is

25. COVENANT TO SURRENDER COPYHOLD.

seised of or well entitled (*a*) unto the inheritance in fee-simple in possession, according to the custom of the manor of [A.], of and in the copyhold or customary messuages, lands, tenements, and hereditaments, hereinafter covenanted to be surrendered: AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the said hereditaments at or for the price or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £—— of lawful British money, paid by the said [*purchaser*] to the said [*vendor*] at or before the execution of these presents, the receipt whereof he the said [*vendor*] doth hereby acknowledge, and of and from the same doth release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, he the said [*vendor*], for himself, his heirs, executors, and administrators, DOTH hereby covenant and agree with the said [*purchaser*] (*b*), his heirs and assigns, that he the said [*vendor*] or his heirs will or shall, on the request and at the costs and charges of the said [*purchaser*], his heirs or assigns, at the next or some other subsequent customary court (*c*) to be holden for the said manor of [A.], or out of

dor's title and agreement for the purchase.

Testatum.

Vendor covenants to surrender the premises to the use of the purchaser, in fee.

(*a*) If for a life or lives, say,

"To the copyhold or customary messuages &c. hereinafter covenanted to be surrendered for the term of his life, (*or*, for the lives of A. and B., and the longest liver of them)."

Copyholds for lives.

(*b*) If for lives and limited to executors, say,

"his executors, administrators, and assigns."

(*c*) [This court is often erroneously referred to as the court baron. The court baron, which seems to be essential to the existence of a perfect manor, is a common-law court, composed of the *barons* or *freemen* holding of the lord, the jurisdiction of which, except as to freebench, is taken away by the stat. 3 & 4 Will. 4, c. 27, s. 36. If all the freeholds get into the hands of one freeholder, the manor is suspended for the time; and if by release or merger the seignory is absolutely extinguished as to all the freeholds, the manor is permanently at an end, and becomes a manor in reputation. See *Glover* v. *Lane*, 3 T. R. 447; *Bradshaw* v. *Lawson*, 4 T. R. 443; *Soane* v. *Ireland*, 10 East, 259; *Doe* d. *Clayton* v. *Williams*, 11 Mee. & W. 803. The extinction of the manor by the loss of the freehold tenant does not affect the powers or rights of the lord and customary tenants; and the customary courts and all the customary proceedings may be held and transacted as before. Co. Tr. 53.]

Customary court and court baron distinguished.

[By the stat. 4 & 5 Vict. c. 35, s. 86, it is enacted, "That after the 31st December, 1841, it shall be lawful for the lord of any manor, or his steward, or the deputy of such steward, to hold a customary court for

Stat. 4 & 5 Vict. c. 35, s. 86, lords or

25. COVENANT TO SURRENDER COPYHOLD.

court, as soon as may be, surrender into the hands of the lord or lady of the said manor for the time being according

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stewards may hold courts in absence of tenants.

such manor, notwithstanding at the time of holding the same there shall not be any person who shall hold lands of such manor by copy of court roll, and also notwithstanding, if there shall at the time of holding such court be any person or persons who shall hold lands of such manor by copy of court roll, there shall not be any such person present at such court, or there shall not be more than one such person present at such court; and every court so holden shall be deemed and taken for all purposes whatsoever to be a good and sufficient customary court. Provided always, that no proclamation made at any court so holden shall affect the right, title, or interest of any person not present at the same, unless notice of such proclamation having been made shall be duly served within one month after such meeting shall have been holden, on the persons whose right, title, or interest may be affected by such proclamation."

Sect. 87, lords or stewards may, out of the manor and out of court, grant lands to be held by copy.

[Sect. 87. "That after the 31st December, 1841, it shall be lawful for the lord of any manor or his steward, or the deputy of such steward, to grant, at any time, and at any place either within or out of such manor, and without holding a court for such manor, any lands, parcel of such manor, to be held by copy of court roll, or according to the custom of the said manor, which such lord shall for the time being be authorized or empowered to grant out to be held by copy of court roll, or according to such custom; so nevertheless that such lands be granted for such estate only, and to such person only as such lord, steward, or deputy shall for the time being be authorized or empowered to grant the same."

Sect. 88, lord or steward may admit out of the manor and out of court.

[Sect. 88. "That after the 31st December, 1841, it shall be lawful for the lord of any manor, or his steward, or the deputy of such steward, to admit at any time, and at any place either within or out of such manor, and without holding a court for such manor, any person as tenant to any lands, parcel of such manor, to be held by copy of court roll, or according to the custom of such manor, to and for which such person shall, for the time being, be entitled to be admitted."

Sect. 89, every surrender, &c., delivered to the lord or steward, and every fact proved to the lord or steward, at any court whereat a homage shall not be assembled, shall be forthwith entered on the rolls and be equivalent to an entry on a presentment by the homage.

[Sect. 89. "That after the 31st December, 1841, every surrender and deed of surrender which the lord shall be compellable to accept or shall accept, and also every will and codicil a copy of which respectively, shall be delivered to the lord of the manor of which the lands affected by such surrender, deed of surrender, will and codicil, are parcel, or to his steward, or the deputy of such steward, either at any court holden for such manor at which there shall not be any homage assembled, or out of court, and also every grant and admission by the lord of any manor, or his steward, or the deputy of such steward, pursuant to this act, shall be forthwith entered on the court rolls of the manor by such lord, or steward, or deputy; and every entry made on the court rolls of any manor pursuant to this present clause shall for all purposes whatsoever be deemed and taken to be an entry made in pursuance of a presentment made at a court holden for such manor by the homage assem-

to the custom of the same manor, All &c., (*describe the parcels to be surrendered, and insert general words, and the reversion and reversions, &c., and all the estate, &c.*) To THE USE (*d*) of the said [*purchaser*], his heirs and assigns (*e*) for ever, to the intent that the said [*purchaser*], his (*f*) heirs or assigns, may be admitted a tenant or tenants of the said copyhold premises (*g*); To HOLD the same at the will of the lord, according to the custom of the said manor, and by the rents, suits, and services therefore due and of right accustomed (*h*). AND the said [*vendor*], for himself, his heirs, ex- Covenants by

25. COVENANT TO SURRENDER COPYHOLD.

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bled thereat." And the steward or his deputy shall be entitled to the same fees and other charges for such entry.

[Sect. 90. "That after the 31st December, 1841, it shall not be essential in any case to the validity of the admission of any person as tenant of any lands held of any manor by copy of court roll or according to the custom of such manor, that a presentment shall be made by the homage assembled at any court holden for such manor of the surrender, will, or other instrument or fact in pursuance or in consequence of which such admission shall have been granted."

Sect. 90, presentment by homage not essential to validity of admission.

[For the other provisions of this act, see the note to the precedent of a deed of enfranchisement, infra.]

(*d*) If it is deemed advisable to introduce into the limitations a power of appointment, ut ante, p. 186, the following addition should be made to the precedent in the text:—

"To the uses following, that is to say, To SUCH USES, for such estate or estates, and to and for such intents and purposes as the said [*purchaser*] shall, at any time or times, or from time to time, by any deed or deeds, or by his last will, direct or appoint, and in default of such direction or appointment, and in the mean time until the same shall take effect, and subject to any direction or appointment which shall not be a complete disposition of the fee-simple and inheritance of the said hereditaments, To THE USE &c."

(*e*) If for a life or lives, omit the words "for ever."

(*f*) "Appointees."

(*g*) "for and during the residue of the natural life of the said [*vendor*], (*or*, for and during the lives of the said A. and B., and the life of the longest liver of them, or for and during such new life or lives as the said [*purchaser*], his heirs or assigns, shall nominate and appoint)."

(*h*) [If parties to whose use the copyholds have been surrendered join

25. COVENANT TO SURRENDER COPYHOLD.

vendor that he is lawfully seised.

ecutors, and administrators, doth hereby covenant and agree with the said [*purchaser*], his heirs and assigns, that, (notwithstanding any act, deed, matter, or thing whatsoever, made, done, procured, or permitted by the said [*vendor*]), he the said [*vendor*] is now lawfully and rightfully seised of or well entitled unto the —— and hereditaments hereinbefore covenanted to be surrendered, for (*i*) a good estate of inheritance in fee-simple in possession, according to the custom of the said manor; *And also*, that (notwithstanding any such act, deed, matter, or thing as

—and hath power to surrender.

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for the purpose of releasing their right to the intended surrenderor, (who, of course, has been admitted), add :—

Release by parties beneficially interested.

"AND THIS INDENTURE FURTHER WITNESSETH, that, for the considerations hereinbefore expressed, and for the better enabling the said [*surrenderor*] to surrender the said —— and hereditaments hereby covenanted to be surrendered unto and to the use of the said [*purchaser*], his heirs and assigns, in manner aforesaid, they the said [*releasors*], by these presents, Do, and each of them DOTH remise, release, and quit claim unto the said [*surrenderor*], and his heirs and assigns, all the copyhold and customary hereditaments and premises hereinbefore devised and hereby covenanted to be surrendered, with the appurtenances, and also all the estate, right, title, interest, trust, property, claim, and demand whatsoever, both at law and in equity, of them the said [*releasors*], and each of them, in, to, of, or upon the said ——, hereditaments and premises, and every part thereof, TO HAVE AND TO HOLD all the said ——, hereditaments and premises, unto and to the use of the said [*surrenderor*], his heirs and assigns, according to the custom of the said manor, nevertheless, upon trust and to the intent that he the said [*surrenderor*] shall and do surrender and assure the same according to the true intent and meaning of the covenant hereinbefore in that behalf contained, and of these presents."

[The covenants for title will be, by all the parties beneficially interested, that the intended surrenderor is well entitled &c.; and for further assurances by all parties, in the usual form.]

(*i*) "and during the term of his natural life," *or*, "for and during the lives of the said A. and B., and the life of the longest liver of them."

aforesaid,) He the said [*vendor*] now hath in himself good right and lawful and absolute authority to surrender all and singular the —— and hereditaments hereinbefore covenanted to be surrendered with their appurtenances (*k*), To the use of the said [*purchaser*] (*l*), his heirs and assigns, for (*m*) ever, in manner aforesaid, according to the true intent and meaning of these presents; *And further*, that he the said [*purchaser*], his [appointees] heirs and assigns, shall and lawfully may, from time to time, and at all times (*n*) for ever hereafter, peaceably and quietly hold and enjoy the —— and hereditaments hereinbefore covenanted to be surrendered, with their appurtenances, and receive and take the rents and profits thereof to and for his and their own use, without any eviction or interruption from or by the said [*vendor*] or his heirs, or any other person or persons whomsoever, lawfully claiming any estate, right, title, trust, or interest, in, to, or out of the same premises, from or under him or them, or by, or through the acts, defaults, privity, consent, or procurement of him, them, or any of them; And that free and clear, or by him the said [*vendor*], his heirs, executors, or administrators, effectually kept indemnified of, from, and against all and all manner of gifts, grants, surrenders, rights, titles, and incumbrances whatsoever, made, done, or permitted by the said [*vendor*], or occasioned by, through, or with his act, default, privity, consent, or procurement; *And moreover*, that he the said [*vendor*], and his heirs, and every other person whosoever lawfully claiming any estate, right, title, trust, or interest in, to, or out of the —— and hereditaments hereinbefore covenanted to be surrendered as afore-

25. COVENANT TO SURRENDER COPYHOLD.

—for quiet enjoyment.

—free from incumbrances.

—and for further assurance.

(*k*) If a power to appoint is given, instead of the words—"to the use of the said [*purchaser*], his heirs," &c., say—

"to the uses hereinbefore expressed concerning the same."

(*l*) "his executors, administrators, and assigns."

(*m*) If for a life or lives, omit the words—"for ever."

(*n*) "henceforth during the natural life of the said [*vendor*]," *or*, "during the lives of the said A. and B., and the life of the longest liver of them," *or*, "during the lives of the persons so to be nominated and appointed, and the life of the longest liver of them."

25. COVENANT TO SURRENDER COPYHOLD.

said, from, through, or under him or them, will and shall from time to time, and at all times hereafter, upon the reasonable request, and at the cost of the said [*purchaser*], his [appointees] heirs or assigns, make, do, execute, and perfect all such further acts, surrenders, and assurances whatsoever, for the more effectually surrendering and assuring the said —— and hereditaments hereinbefore covenanted to be surrendered to the use of the said [*purchaser*], his [appointees] heirs and assigns for ever, at the will of the lord, according to the custom of the said manor, as by the said [*purchaser*], his [appointees] heirs or assigns, or his or their counsel shall be required. IN WITNESS, &c.

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26. RELEASE OR GRANT IN FEE. (SHORT FORM).

[26. RELEASE IN FEE *of Freeholds by a* VENDOR AND HIS WIFE *to Uses to prevent Dower in favour of a Purchaser.* (*Variations where, the Property being* SUBJECT TO A MORTGAGE FOR YEARS, *the* CONVEYANCE IS MADE BY GRANT, *with or without the concurrence of the Mortgagee, so as to* AVOID *the* STAMP *on a* BARGAIN AND SALE FOR A YEAR; *and also where the conveyance is taken by* APPOINTMENT. (*A very short Form*) (*a*).

Reference to 4 & 5 Vict. c. 21.

THIS INDENTURE, made the —— day of ——, in pursuance of the statute (*b*) for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties,

Parties.

BETWEEN [*vendor*], of &c., and [*wife*], his wife, of the first part; [*purchaser*], of &c., of the second part; and [*trustee*], of &c., of the third part: [WHEREAS (*c*)

As to the use of very short forms.

(*a*) [The experience of most practitioners must have taught them that very short conveyances of small properties are daily growing into more frequent use, and that the advisers of purchasers and mortgagees from persons claiming under such conveyances are disposed, in consideration of the smallness of the property, to waive those objections which, in transactions of greater magnitude, are still frequently made to concise and novel phraseology.]

(*b*) [If the conveyance is to be by grant, omit this reference to the statute. Vide infra, p. 205, n.]

As to omitting recital of title.

(*c*) [Where brevity is very much desired, and the next prior document of title discloses all the facts material to the title of the present

26. RELEASE OR GRANT IN FEE. (SHORT FORM).

[*testator*], late of ——, by his will, (proved on the —— day of ——, 18—, in the —— court of ——), devised the hereditaments hereinafter described to the use of his wife (since deceased) for her life, with remainder to the use of the said [*wife*] by her then name of [*maiden name*], and her heirs and assigns (*d*): AND WHEREAS the said [*vendor*] and [*wife*], his wife, have sold the said hereditaments to the said [*purchaser*] for £——]. NOW THIS INDENTURE WITNESSETH that, in consideration of £—— already paid by the said [*purchaser*] to the said [*vendor*], the said [*vendor*] and [*wife*], his wife, hereby grant (*e*), release, and confirm unto the said [*purchaser*] and his heirs, ALL that piece of land, with the messuage thereon, called ——, lying in the parish of ——, in the county of ——, and, in the plan endorsed hereon, distinguished by a red colour, WITH all the appurtenances thereto now or heretofore in fact or reputation belonging; AND all the estate, right, and title at law or in equity of the said [*vendor*] and [*wife*], his wife (*f*), therein and thereto; TO HOLD the said hereditaments and premises unto

Recitals.

Testatum.

Parcels.

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conveying party, and such document, or an attested copy of it, is delivered to the purchaser, the usual recital of title may be omitted. If the recital of the contract is also omitted, which may safely be done, the operative part will follow immediately upon the enumeration of the parties.]

(*d*) "AND WHEREAS, by indenture, dated &c., and made &c., the said hereditaments were demised to the said —— for a term of —— years, to secure to him £—— and interest, which latter is paid up to the —— day of —— last."

Recital of mortgage for years.

(*e*) [If the conveyance is by grant, the word "release" may be omitted. If the mortgagee joins, say—

"In consideration of £—— to the said [*mortgagee*], in full for all principal and interest owing on the said security, and of £—— to the said [*vendor*] and [*wife*], his wife, already paid, the said [*vendor*] and [*wife*], his wife, grant and confirm, and the said [*mortgagee*] assigns and surrenders unto," &c.

Surrender by mortgagee.

If the conveyance is taken by appointment, say (with or without any particular or general reference to the power):—

"The said [*vendor*] hereby appoints that ALL (*parcels*), with the appurtenances, shall henceforth be and remain To SUCH USES as the said [*purchaser*] shall," &c. (*ut supra*).]

(*f*) "And the said [*mortgagee*],"

26. RELEASE OR GRANT IN FEE. (SHORT FORM).

the said [*purchaser*] and his heirs TO SUCH USES as he shall, by any deed or deeds, revocably or irrevocably, or by will, appoint; and, subject thereto, TO THE USE of the said [*purchaser*] during his life, with remainder TO THE USE of the said [*trustee*] and his executors or administrators during the life of, and *in trust* for, the said [*purchaser*] with remainder TO THE USE of the said [*purchaser*], his heirs and assigns for ever (*g*).

General words.

Habendum to uses to prevent dower.

Covenants for title, &c.

AND the said [*vendor*], for himself, his heirs, executors, and administrators, and for and against the acts and defaults only of himself, or of the said [*wife*], his wife, or of any person or persons claiming, or to claim, through, under, or in trust for them or either of them, covenants with the said [*purchaser*], and his heirs (*h*), *That* the said [*vendor*] (*i*) and [*wife*], his wife have, or one of them hath, power and authority hereby to release, [*or*, grant, *or*, appoint], or otherwise assure the said hereditaments and premises in manner and to the uses aforesaid, according to the intent hereof; *And that* the same hereditaments and premises shall henceforth be held and enjoyed accordingly, free from all incumbrances (*k*); *And* shall, from time to time, and at any time or times hereafter, at the costs of the person or persons requiring the same, be further and more effectually or satisfactorily assured, to the uses aforesaid, or otherwise, by such acts, deeds, or other assurances as the said [*purchaser*], his appointees, heirs or assigns, shall reasonably require and tender to be done, executed, or made. AS WITNESS the hands and seals of the said parties.]

Covenant by mortgagee that he has not incumbered.

(*g*) "AND the said [*mortgagee*], for himself, his heirs, executors, and administrators, covenants with the said [*purchaser*], his heirs, &c., that the said [*mortgagee*] hath not heretofore in any way disposed of or incumbered the said hereditaments and premises, or any part thereof."

(*h*) [When the vendor releases, he covenants with the releasee to uses, and with the like words of limitation; but when he appoints, he is a stranger to the estate, and his covenants are frequently made to follow the limitation of the use. (See Cornish on Purchase Deeds, p. 176). But it is useless to name "appointees" as covenantees, for (except, perhaps, where the conveyance is by deed poll) the covenants will run with the estates of such persons only as are parties to the deed.]

(*i*) [If the vendor appoints, omit the previous reference to the acts of the wife, and say here,

"hath power and authority hereby to appoint the said &c."

(*k*) If the conveyance is so taken, add—

"Except the aforesaid mortgage security."

27. RELEASE *in* FEE *to two* PERSONS *in* EQUAL SHARES, *and* (*by same Deed*) ASSIGNMENT *of* TERMS, *in* TRUST *to* ATTEND (*a*). *Short Recitals. Variation when the* SALE *is* MADE *under a* POWER OF ATTORNEY.

27. RELEASE IN FEE AND ASSIGNMENT OF TERMS.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; [A.], [*assignor of* 2000 *years' term*], of &c., of the second part; [B.], [*assignor of* 1000 *years' term*], of &c., of the third part; [C.], [*purchaser of one moiety*], of &c., and [D.], [*purchaser of other moiety*], of &c., of the fourth part (*b*); [*trustee of* 2000 *years' term*], of &c., of the fifth part; and [*trustee of* 1000 *years' term*], of &c., of the sixth part; WHEREAS the said [*vendor*] is seised to him and his heirs, in fee-simple, of the rectories, manors, lordships, messuages, lands, tenements, and hereditaments, hereinafter described. AND WHEREAS the said [A.] is possessed of the said rectories, &c., for the residue of a term of 2000 years, In trust for the said [*vendor*], his heirs and assigns, and to attend the inheritance; And the said [B.] is also possessed of the same rectories, &c., for the residue of a term of 1000 years, in trust for the said [*vendor*], his heirs and assigns, and to attend the inheritance; the commencements or grants of which several terms are hereinafter mentioned (*c*):

Parties.

Recital that vendor is seised in fee, and assignors are possessed of terms;

(*a*) See some observations on Assignments of Terms, ante, p. 106. The precedent in the text exemplifies a short mode of referring to the creation of terms. As to the merger of terms, see the chapter on merger, ante, Vol. 8; 3 Sugd. Vend. 10th ed. 19; and 3 Prest. Conv. passim.

(*b*) In order to avoid increasing the number of the parties, each purchaser is made dower-trustee for the other.

Purchasers may be trustees for each other.

(*c*) ["AND WHEREAS the said [*vendor*] did, by deed poll under his hand and seal, bearing date &c., make, constitute, and appoint [*attorney*], of &c., his attorney, to make sale and dispose of all his messuages, lands, hereditaments, and real estate of whatsoever tenure in England, and all his estate and interest therein by public auction or private contract, subject &c., with power &c., (*follow the terms of the power*). AND WHEREAS the said [C.] and [D.] have contracted with

Recital of power of attorney.

27. RELEASE IN FEE AND ASSIGNMENT OF TERMS.

—of contract for purchase.

—of request of purchasers for conveyance and assignment of terms.

AND WHEREAS the said [C.] and [D.] have contracted with the said [*vendor*] for the absolute purchase of the said rectories, manors, lordships, &c., and the fee-simple and inheritance thereof, free from all incumbrances, at the price or sum of £——, and have requested that the same may be conveyed to the uses hereinafter limited concerning the same; and that the said several terms of years may be assigned, in trust for them the said [C.] and [D.], their heirs, appointees, and assigns, and to attend the inheritance of the said hereditaments, in such manner as is hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in execution of the said contract, and in consideration of the sum of £—— sterling to the said [*vendor*] (*d*) paid by the said [C.] and [D.] in equal moieties, at or immediately before the execution of these presents, in full for the absolute purchase of the rectories, manors, or lordships, &c., hereinafter described, and the fee-simple thereof, the receipt, &c., (*e*), the said [*vendor*] DOTH, by these presents, made in pursuance of an act of Parliament passed in the fourth year of the reign of Queen Victoria, intituled "An Act for rendering a Release as effectual for the Conveyance of freehold Estates as a Lease and Release by the same Parties," grant, bargain, sell, and release, unto the said [C.] and [D.], and their heirs, ALL those the rectories, manors, lordships, messuages, lands, tenements, and hereditaments, comprised and described in the schedule hereunder written or hereto annexed, together with all [houses, outhouses, edifices, buildings, barns, stables, coach-houses, cottages, dovecots, yards, gardens, orchards, backsides, tofts, crofts, glebe and other lands, meadows, pastures, heaths, moors, marshes, bogs, wastes, waste ground, fields, field courses and liberty of foldage, feedings, parks, warrens, commons, common of pasture, common of turbary, mines, minerals, quarries, mills, mulctures, customs, tolls, duties,

Testatum.

In consideration, &c., vendor releases to purchasers.

Parcels by reference to schedule.

General words for manors and rectories.

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the said [*vendor*] through the said [*attorney*], his attorney, for the absolute purchase," &c., *ut supra*.]

(*d*) "By the hands of the said [*attorney*], his attorney."

Acknowledgment of payment by attorney.

(*e*) [The acknowledgment in the deed of the receipt of the money will be in the name of the vendor, although the deed is executed by the attorney. The receipt endorsed will be signed by the attorney in his own name, and by the description of—

"the above-mentioned attorney for the said [*vendor*]."]

27. RELEASE IN FEE AND ASSIGNMENT OF TERMS.

tithes, oblations, obventions, furzes, trees, woods, underwood, coppices, and the ground and soil thereof, mounds, fences, hedges, ditches, freeboards, ways, waters, watercourses, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, perquisites, and profits of courts, view of frankpledges, and all that to view of frankpledge doth belong, reliefs, heriots, fines, sums of money, amerciaments, goods and chattels of felons and fugitives, felons of themselves, outlawed persons, deodands, waifs, estrays, treasure-trove, chief rent, quit-rents, rents-charge, rents-seek, rents of assize, fee farm-rents, boons, services, royalties, jurisdictions, franchises, liberties] privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to the said rectories, &c., hereby granted, released, and confirmed, or intended so to be, belonging or in anywise appertaining, or with the same or any of them respectively now or at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member of them, or of any part of them, or as appurtenant thereunto, with their and every of their appurtenances; And the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all the said rectories, &c., hereby granted, released, or confirmed, or intended so to be; And all the estate, right, title, interest, inheritance, use, trust, possession, property, profit, claim, and demand whatsoever, both at law and in equity, of him the said [*vendor*], in, to, and out of or upon the said rectories, &c., and every part and parcel thereof, and all deeds, &c. To HAVE AND TO HOLD the said rectories, &c., and all and singular other the hereditaments hereby released, or intended so to be, with their actual and reputed (*f*) rights, royalties, members, and appurtenances, unto the said [C.] and [D.], and their heirs, for ever, to the uses and upon the trusts, hereinafter limited concerning the same, (that is to say); As to, for, and concerning one un-

Habendum to uses to prevent dower in each moiety.

(*f*) [As to the use of the word "reputed," and the evidence admissible under it, see *Murley* v. *M'Dermott*, 3 Nev. & P. 356; and generally as to the construction of these sweeping words, see *Anon.*, Lofft, 398; *Doe* d. *Davies* v. *Williams*, 1 H. Bl. 25; *Att.-Gen.* v. *Downshire*, 5 Price, 269; *Doe* d. *Smith* v. *Galloway*, 5 B. & Ad. 43; *Doe* d. *Meyrick* v. *Meyrick*, 2 Cr. & J. 223; *Chapman* v. *Gatcombe*, 2 Scott, 738; *Brown* v. *Meredith*, 2 Keen, 527; *Plant* v. *James*, 6 Nev. & M. 282; 4 Ad. & E. 749; *Hill* v. *Paul*, 8 Cl. & Fin. 295; *Mosely* v. *Motteux*, 10 Mee. & W. 533; *Doe* d. *Clayton* v. *Williams*, 11 Id. 803.]

27. RELEASE IN FEE AND ASSIGNMENT OF TERMS.

divided moiety or equal half part of the rectories, &c., intended to be hereby released, To SUCH USES, *for such estates, &c.*, (*uses to prevent dower in favour of* [C.], *ut ante, p.* 73); And as to, for, and concerning the other undivided moiety or equal half part of the rectories, manors, lordships, &c., intended to be hereby released, To SUCH USES, &c., (*like uses in favour of* [D.];) And the said [C.] and [D.] respectively hereby declare that their respective wives, if they shall happen to survive them respectively, shall not be entitled to dower in or out of the respective undivided moieties or equal half parts hereinbefore limited to them the said [C.] and [D.] respectively of and in the said manor or lordship, &c., hereby released, or intended so to be; AND the said [*vendor*] doth for himself, his heirs, executors, and administrators, covenant with the said [C.] and [D.], and their heirs, (*Add covenants for title, ut ante, p.* 165, *see p.* 75). AND THIS INDENTURE ALSO WITNESSETH, that, in further execution of the said contract, and also in consideration of ten shillings to the said [A.] by the said [E.] already paid, the said [A.], by the direction of the said [*vendor*], and on the nomination of the said [C.] and [D.], (testified by their severally executing these presents), *Doth* by these presents bargain, sell, assign, and transfer unto the said [E.], his executors, administrators, and assigns, *All and singular* the rectories, manors, lordships, &c., hereinbefore described, and intended to be hereby released, and every part and parcel of the same, with their and every of their rights, royalties, members, and appurtenances, or so much or so many of them as were assigned to and are now vested in the said [A.], as aforesaid; And all the estate, &c.; To HAVE AND TO HOLD the said rectories, manors, lordships, &c., and all other the premises intended to be hereby assigned by the said [A.], with their rights, royalties, members, and appurtenances, unto the said [E.], his executors, administrators, and assigns, henceforth, during all the residue now unexpired of a certain term of two thousand years therein, created by an indenture of three parts, dated (*g*) &c., and made between &c., and for all other the term and estate of the said [A.] therein, upon the

Vendor covenants for title.

Further testatum.

[A.] at the request of vendor, &c., assigns to purchaser's trustee.

Habendum.

For the residue of a term of 2000 years created, &c.

(*g*) This deed exemplifies a short mode of stating the creation of terms. Another, and, perhaps, rather a neater method, is to refer to the deed creating the term in the recital, which then states that the trustee is possessed, &c., for all the residue of a certain term created by such a deed.

trusts hereinafter declared concerning the same. (*Covenant by* [*A.*] *with* [*E.*] *that he has not incumbered, ut ante, p.* 106). AND THIS INDENTURE FURTHER WINESSETH, &c., (*like assignment of the term of* 1000 *years by* [*B.*] *to* [*F.*]); (*covenant by* [*B.*] *with* [*F.*] *that he has not incumbered*); AND it is hereby declared and agreed, [by and between the said parties to these presents, so far as they respectively are interested], that the said [E.] and [F.] respectively, and their respective executors, administrators, and assigns, shall henceforth stand and be possessed of and interested in the rectories, manors, lordships, &c., hereinbefore assigned to them respectively, [or intended so to be, with their and every of their rights, royalties, members, and appurtenances], for the several residues of the terms for which the same premises are respectively assigned to them as aforesaid; IN TRUST for the said [C.] and [D.] respectively, and their respective heirs, appointees, and assigns, in the several shares and proportions limited to them as aforesaid, and to be from time to time assigned and disposed of as they the said [C.] and [D.] respectively, and their respective heirs, appointees, and assigns, shall direct or appoint; and in the mean time to attend and wait upon the reversion, freehold, and inheritance of the hereditaments and premises comprised in the same terms respectively, according to the several uses, trusts, intents, and purposes hereinbefore limited concerning the same, [and for the benefit of the several persons entitled, or to be entitled, under such uses, trusts, intents, and purposes, and] in order to protect the same [freehold, reversion, and inheritance] from and against all charges and incumbrances, if any such there be, mesne and subsequent to the creation of the same terms respectively. IN WITNESS, &c. (*h*).

27. RELEASE IN FEE AND ASSIGNMENT OF TERMS.

Like assignment of 1000 years' term.

Declaration that trustees will stand possessed of the terms respectively assigned to them.

In trust as the purchaser shall direct, and in the mean time to attend the inheritance.

(*h*) [IN WITNESS whereof the said [*attorney*], by virtue of the power and authority contained in the above-recited deed poll of the —— day of ——, which deed poll (*or*, a copy whereof) is hereunto annexed, hath hereunto set the seal and subscribed the name of the said [*vendor*], the day and year first above written." (*Attestation, ut ante, Vol.* 3, *p.* 26).

Execution by attorney.

Of course, when a deed is executed under the authority of a power of attorney, the power should be delivered to the purchaser, or he should have an attested copy of it, and a covenant for its production.]

28. RELEASE IN FEE BY MORTGAGOR AND MORTGAGEE.

28. RELEASE *in* FEE *by* MORTGAGOR *and* MORTGAGEE *in Fee to* PURCHASER. (*Variation where the* MORTGAGE *is for a* TERM *which the Mortgagee* SURRENDERS) (*a*).

THIS INDENTURE, made the —— day of ——, in the year ——, BETWEEN [*mortgagee*], of &c., (*b*), of the first part; [*vendor*], of &c., of the second part; [*purchaser*], of &c., of the third part; and [*purchaser's trustee*], of &c., of the fourth part. WHEREAS, by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, 18—, being respectively made between the said [*vendor*] of the one part, and the said [*mortgagee*] of the other part; he the said [*vendor*] did convey and assure unto the said [*mortgagee*], his heirs and assigns, All and singular the —— and hereditaments hereinafter described, and expressed to be hereby released: *To hold* the same unto and to the use of the said [*mortgagee*], his heirs and assigns, for ever; subject, nevertheless, to a proviso or agreement in the said indenture of release contained for the redemption of the said hereditaments, on payment by the said [*vendor*], his heirs, executors, administrators, or assigns, unto the said [*mortgagee*], his executors, administrators, or assigns, of the sum of 1000*l.*, with interest for the same, at the respective times and in the manner therein mentioned: AND WHEREAS the said principal sum of 1000*l.* is now owing upon the hereinbefore recited mortgage, but all interest for the same has been paid up to the day of the date of these presents, as the said [*mortgagee*] doth hereby acknowledge. AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the inheritance in fee-simple of and in the —— and hereditaments comprised in the hereinbefore in part recited indentures of lease and release, at or for the

Parties.

Recital of mortgage;

—of money due on mortgage;

—of contract for purchase.

(*a*) [See another form and observations, infra, p. 209.]

Order of parties.

(*b*) In arranging the order of the parties to a deed, it is usual to place persons having the legal estate before those who have equitable interests only, and persons having freehold estates before those who have chattel interests.

28. RELEASE IN FEE BY MORTGAGOR AND MORTGAGEE.

price or sum of 1500*l.*, out of which sum of 1500*l.* it hath been agreed that the said sum of 1000*l.* owing to the said [*mortgagee*] as aforesaid shall be paid off and discharged. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 1000*l.* of lawful British money, paid by the said [*purchaser*] (at the request and by the direction of the said [*vendor*], testified by his executing these presents), to the said [*mortgagee*] at or before the execution hereof, (the receipt of which sum of 1000*l.*, and that the same is in full satisfaction and discharge of all monies owing upon the hereinbefore in part recited mortgage, he the said [*mortgagee*] doth hereby acknowledge, and of and from the same doth acquit, release, and discharge the said [*vendor*], his heirs, executors, and administrators, and also the said [*purchaser*], his appointees, heirs, executors, administrators, and assigns, for ever, by these presents): *And also* in consideration of the sum of 500*l.* of like lawful money, at the same time paid by the said [*purchaser*] to the said [*vendor*], (the receipt of which sum of 500*l.* and the payment of the said sum of 1000*l.*, in manner aforesaid, making together the said purchase-money or price of 1500*l.*, he the said [*vendor*] doth hereby acknowledge, and of and from the same respectively doth acquit, release, and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, for ever, by these presents); He the said [*mortgagee*] (at the request and by the direction of the said [*vendor*], testified as aforesaid) DOTH by these presents (made in pursuance &c., *ut ante*, *p.* 72 (*c*)) bargain, sell, and release (*d*); and the said [*ven-*

Testatum.

The mortgagee, in consideration of the mortgage money, and the mortgagor, in consideration of the remainder of the purchase-money, convey the estate to the vendee and his heirs.

(*c*) Where, by a deed conveying the inheritance in lands, an immediate term is assigned or surrendered, the deed operates as a grant of the reversion in fee expectant on the term, and the reference to the statute 4 & 5 Vict. c. 21, and the lease-for-a-year stamp, may be dispensed with. But it is not in general advisable to rely on the term for this purpose, unless the identity of the premises be incontestable, and it be quite clear that the deed creating the term took effect as the limitation of a *use*, and not as a mere common-law demise requiring to be perfected by entry. Vide ante, Vol. 4, p. 312.

(*d*) If the mortgage is for a term, which is to be surrendered, instead of the words here following in the text, say—

"And to the intent that the residue of the said term of —— years created by the hereinbefore recited indenture of mortgage of the —— day of ——, and all other the term, estate,

Variation where mortgage is for a term.

28. RELEASE IN FEE BY MORTGAGOR AND MORTGAGEE.

dor] DOTH grant, bargain, sell, release, ratify, and confirm unto the said [*purchaser*] and his heirs, ALL THAT &c. (*describe parcels* (*e*); *and general words*); *And all* the estate, right, title, interest, use, trust, equity of redemption, inheritance, property, term, claim, and demand whatsoever, both at law and in equity, of them the said [*mortgagee*] and [*vendor*] respectively, in, to, of, or upon the same premises; *And* all deeds, evidences, and writings, which relate to or concern the same premises, or any part thereof, solely or together with other hereditaments of less value, which they the said [*mortgagee*] and [*vendor*] respectively now have in their respective custody, or can procure without suit, together with true copies of all such other deeds, evidences, and writings, as concern or relate to the same premises or any part thereof, jointly with any other lands or hereditaments of equal or greater value, the same copies when first taken to be made at the costs of the said [*vendor*], his heirs or assigns: TO HAVE AND TO HOLD the said ——, and all and singular other the premises hereinbefore mentioned to be hereby released, with their appurtenances, unto the said [*purchaser*] and his heirs, (*To uses to prevent dower, ut ante, p.* 73; (*f*) *Covenant by mortgagee that he has not in-*

And all the estate, &c.

And all deeds, &c.

Habendum to the vendee to uses to prevent dower.

Covenants by vendor—

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and interest (if any) of the said [*mortgagee*] may be merged and utterly extinguished in the reversion and inheritance of the hereditaments hereby released, He the said [*mortgagee*], at the request, and by the direction of the said [*vendor*], testified as aforesaid, *Doth* by these presents assign, surrender, and yield up; and the said [*vendor*] *Doth* grant," &c.

The surrender is sometimes made by a separate testatum, but it is more usual, at the present day, for the sake of brevity, to incorporate it with the release, as in the text; this can be conveniently done, where the inheritance is conveyed by release, but not where it is conveyed by appointment merely.

(*e*) If the premises are in the occupation of a tenant from year to year, say—

"which premises are now in the occupation of [A. B.], as tenant from year to year to the said [*vendor*]."

(*f*) [It may be proper to guard against the doctrine in *Toulmin* v. *Steere*, 3 Meriv. 210, (infra, p. 210), by inserting this clause—

Proviso that mortgage debt

"And it is hereby expressly agreed and declared that, for the purpose of protecting the said [*purchaser*], his heirs and as-

cumbered, ut ante, p. 75 (*g*)): AND (*h*) the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*purchaser*] and his heirs in manner following, (that is to say), That (notwithstanding any act, deed, matter, or thing whatsoever, by him the said [*vendor*], or any person or persons lawfully claiming by, from, or under him or them, at any time heretofore had, made, done, committed, suffered, or executed to the contrary (*i*)), they the said [*mortgagee*] and [*vendor*], or one of them, at the

28. RELEASE IN FEE BY MORTGAGOR AND MORTGAGEE.

That, notwithstanding, &c., he and mortgagee are seised in fee,

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signs, from all mesne charges, incumbrances, and claims (if any such there be) on the said hereditaments and premises, or any of them, or any part thereof, and notwithstanding the said [*purchaser*] may have actually or constructively received notice of any such charge, incumbrance, or claim, the said debt or sum of 1000*l.*, and the interest thereon, and the hereinbefore recited security for the same, shall henceforth be considered as being still alive and on foot, and vested in the owner for the time being of the said hereditaments and premises, unmerged therein and available for all purposes, any rule or doctrine of equity to the contrary notwithstanding."

shall not be merged.

[There is something absurd in the appearance of a proviso of this nature, which betrays the unsoundness of the decisions that appear to make it necessary. (See the note infra, p. 209). It expresses, in fact, nothing more than is contained in the mortgagor's covenants against incumbrances.]

(*g*) This covenant is the same where the mortgage was for a term only.

(*h*) As the mortgagor has not the legal inheritance in the lands, that being in the mortgagee, his covenants, according to the general opinion, would be covenants in gross. The only mode of making them run with the land would be by conveying to him the fee, which might be a dangerous experiment, by letting in incumbrances affecting him. [This danger might be obviated by first limiting a term of years to a trustee.] Vide ante, Vol. 5, p. 512.

Mortgagor's covenants for the title, &c., covenants in gross.

(*i*) It is not usual to except tenancies from year to year at rack rent in a covenant which avers the freedom of the property from incumbrances; but, as such a tenancy constitutes an interest in the land, which does not pass by the conveyance, it is obvious, that, if created by the vendor himself, or any other person to whose acts his covenants extend, it ought to be excepted. In such case, add—

"except as hereinafter is excepted."

What should be excepted out of the vendor's covenant against incumbrances.

28. RELEASE IN FEE BY MORTGAGOR AND MORTGAGEE.

time of the execution of these presents, are or is lawfully and rightfully seised of and entitled to the —— hereditaments, and premises hereinbefore mentioned to be hereby released, for an absolute and indefeasible estate of inheritance in fee-simple in possession; *And that* (notwithstanding any such act, deed, matter, or thing as aforesaid), they the said [*mortgagee*] and [*vendor*], or one of them, now have or hath in themselves or himself full power and absolute authority by these presents to convey and assure all and singular the said hereditaments and premises, *To the uses* and in manner aforesaid, according to the true intent and meaning of these presents; *And further*, that the said hereditaments and premises shall henceforth, and at all times hereafter, remain, continue, and be *To the uses*, upon the trusts, and for the intents and purposes hereinbefore limited and declared concerning the same; and that the same hereditaments and premises shall and may be peaceably and quietly held and enjoyed, and the rents and profits thereof received and taken accordingly, without the interruption or denial of the said [*vendor*], his heirs or assigns, or of any other person or persons whomsoever, lawfully claiming any estate, right, title, or interest, in or to the same hereditaments and premises, by, from, or under him or them, or by, through, or with his or their acts, defaults, means, consent, privity, or procurement (*k*): *And that* free and clear, and freed and clearly exonerated and discharged, or by him the said [*vendor*], his heirs, executors, or administrators effectually kept harmless and indemnified of, from, and against all former and other estates, rights, titles, charges, and incumbrances whatsoever, had, made, done, or occasioned, or suffered by him the said [*vendor*], or any person or persons lawfully claiming by, from, or under him, or by, through, or with his acts, default, means, consent, privity, or procurement (*l*); *And moreover*, that he the said [*vendor*], and his heirs, and every other person whosoever lawfully claiming any estate, right, title, or interest, in or to the said hereditaments and premises by, from, or under

—and have right to convey.

—That the lands shall remain to the uses aforesaid;

—free from incumbrances.

—and for further assurance.

Exception as to tenancy.

(*k*) "except in respect of the estate or interest hereinafter excepted."

(*l*) "except the tenancy from year to year of the said [*tenant*], hereinbefore referred to."

him or them (*m*), will and shall from time to time, and at all times hereafter, upon the request and at the costs of the said [*purchaser*], his appointees, heirs, or assigns, make, do, and execute every such further act, conveyance, and assurance in the law whatsoever, for the more effectually conveying and assuring the said hereditaments and premises, *To the uses*, and in manner aforesaid, according to the true intent and meaning of these presents, as by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel in the law, shall be reasonably advised and required. IN WITNESS &c.

28. RELEASE IN FEE BY MORTGAGOR AND MORTGAGEE.

(*m*) "except the person whose estate or interest is hereinbefore excepted."

29. [CONVEYANCE *of* MANORS, *messuages, and lands, by a* MORTGAGOR *and* MORTGAGEE *to a* PURCHASER, *the* MORTGAGE DEBT *being* ASSIGNED *to a* TRUSTEE *as a* PROTECTION *against* ALL MESNE INCUMBRANCES (*a*). *Adapted to the case where the* VENDOR *covenants to* INDEMNIFY *the* PURCHASER *from a* SECOND MORTGAGE *which had been made of the purchased property with other property, (the security of the latter being deemed sufficient).*

29. BY MORTGAGOR AND MORTGAGEE, AND ASSIGNMENT OF DEBT TO A TRUSTEE TO ATTEND.

THIS INDENTURE, made the —— day of ——, BETWEEN [*mortgagee*], of &c., of the first part, [*vendor*], of &c., Parties.

(*a*) [It has been held in several cases, that the same person cannot be at once mortgagor and mortgagee; so that, if a mortgagee purchases the equity of redemption, or a purchaser of the equity of redemption pays off a mortgage, he cannot set up such mortgage against subsequent incumbrancers of whose security he has actual or constructive notice. Thus in *Greswold* v. *Marsham*, 2 Ch. Cas. 170, a legal mortgagee, who had obtained a decree of foreclosure, and afterwards took an absolute conveyance from the mortgagee for a considerable sum of money, was held bound to pay subsequent judgment creditors of whose charges he had notice before the foreclosure, but not a judgment creditor of whose charge he had not notice. In *Mocatta* v. *Murgatroyd*, 1 P. Wms. 393, Lord C. *Cowper* said, that a mortgagee of a ship, having taken a release of

Merger of charge by purchasing equity of redemption or paying off mortgage.

Greswold v. *Marsham.*

Mocatta v. *Murgatroyd.*

29. BY MORTGAGOR AND MORTGAGEE, AND ASSIGNMENT OF DEBT TO A TRUSTEE TO ATTEND.

of the second part; [*purchaser*], of &c., of the third part; and [*trustee*], of &c., of the fourth part: WHEREAS (*recite first*

Merger of mortgage debt.

Toulmin v. *Steere.*

the equity of redemption, with notice of subsequent mortgages, might, by waiving the release, (and losing, as against the incumbrancers, the security of the ship for the purchase-money), resort to his mortgage again. See 5 Sim. 537. In *Toulmin* v. *Steere*, 3 Meriv. 210, an equity of redemption was purchased by the trustees of a will, and a conveyance taken from a first mortgagee, to the use of L. S. for life, with remainder to the use of his son, an infant. The first mortgagee and a second mortgagee were paid off. It was held, that an intermediate annuitant, of whose charge the trustees were held to have constructive notice, (one of them having acted as solicitor in the annuity transaction), was entitled to rank as primary incumbrancer on the estate. "The purchasers," said Sir *W. Grant*, M. R., "are in no worse situation than if they had bought an estate on which there was no mortgage, but which turned out to be incumbered with an annuity not known to them, in fact, but constructively known to them by means of notice to their agent." "I think the plaintiff ought not to be put to the necessity of redeeming the incumbrances which may at one time have been prior to the annuity." The purchase was, in fact, of two things, viz., the mortgage which was paid off, and the equity of redemption. Had it included the former only, the plaintiffs would have had no remedy as against that charge, but to redeem: why should the benefit of that purchase be diminished, as it must, unless the equity of redemption exceeded in value the plaintiff's incumbrance, because the bargain is extended to something more? The decision has been much disapproved of: an intended appeal was prevented by a relation of the family paying the money, in order to put an end to the litigation. See 5 Russ. 148; Ll. & G. Cas. Tem. Sugd. 251. In *Parry* v. *Wright*, 1 Sim. & Stu. 369, some unincumbered lands, and an equity of redemption subject to two mortgages, were conveyed to M. in consideration of £8300, out of which it was agreed he should retain £5010 to pay off the incumbrances. M. subsequently took a conveyance of the legal estate from the first mortgagee to G. in fee, by deed, reciting the purchase of the equity of redemption, and that M. was desirous of paying off the mortgage, and stating the consideration money, £3220, as paid in satisfaction of the mortgage by M. There was no express declaration of trust in favour of M. By indenture of even date, reciting the last indenture, and a contract for the purchase by M. from W. of an annuity of £500 for £5000, and that the £3220 were the monies of W., and part of the £5000, M. granted an annuity of £500 out of all the premises purchased by him; and G. demised the premises to a trustee for W. as a further security. W. had constructive notice of the second mortgage, and it was held by Sir *J. Leach*, V. C., that the second mortgagee was entitled to a decree of foreclosure against M. and W. The evident intention of the parties to keep the first charge on foot was strongly urged by the defendants' counsel, but the Vice-Chancellor said, that, though the parties might have made an arrangement which would have kept that charge on foot, (see *Meux* v. *Smith*,

Parry v. *Wright.*

mortgage for £5000, *and that* £5125 *are now due for principal and interest, ut ante, p.* 204 (*b*). And whereas the said [*pur-*

29. By mortgagor and mortgagee, and assignment of debt to a trustee to attend.

11 Sim. 410), yet, by accepting a demise from G., as trustee for M., W. was precluded from setting up the legal estate against the title of the plaintiff. So that his Honor appears to have thought, that by no means could M., the purchaser of the equity of redemption, have kept the charge alive for his own benefit. And the few words which fell from Lord *Lyndhurst*, C., on affirming the decree, were to the same effect. 5 Russ. 148. These authorities were followed in *Brown* v. *Stead*, 5 Sim. 535, where an estate was mortgaged first to B. for 500 years for £2000, then to S. in fee for £1300, and then again to B. for £600. S. subsequently took a conveyance of the equity of redemption for £4723, the amount due upon the three mortgages, out of which he undertook to pay £3098 due to B. upon the two mortgages. B. obtained a decree for foreclosure against S., although the latter desired to waive the conveyance of the equity of redemption. Again, in *Smith* v. *Phillips*, 1 Keen, 694, A., having made an equitable mortgage to B., agreed to grant a lease to C., who had notice of the mortgage; A. became bankrupt, and, on B.'s petition, the premises were put up for sale under Lord *Loughborough's* Order, and B. purchased them. The agreement was read at the sale, and the solicitor for B. also read an opinion of counsel to the effect that the equitable mortgagee was not bound by the agreement. B. took a conveyance from the assignees expressly subject to the claim of C., but with a protest against such claim. Lord *Langdale*, M. R., held, that C. was entitled to a specific performance against the owner of the equity of redemption, and therefore, the mortgagee having united that interest with his own, against the mortgagee. See also *Gregg* v. *Arrott*, Ll. & G. C. Tem. Sugd. 246; ante, Vol. 5, p. 377.]

Merger of mortgage debt.

Brown v. *Stead.*

Smith v. *Phillips.*

[The doctrine established by the above decisions has been disapproved of, (see 3 Sugd. Vend. 138), and some of the cases might, perhaps, have been otherwise determined. The only principle upon which they can be understood to have proceeded, appears to be founded on the well-settled rules, that a foreclosure is a purchase of the estate in consideration and satisfaction of the debt, (*Perry* v. *Barker*, 8 Ves. 527; 13 Id. 198; ante, Vol. 5, p. 405), and that a purchaser of an equity of redemption is bound to indemnify the mortgagor from all liability un-

Remarks on the doctrine in *Toulmin* v. *Steere.*

(*b*) [The second mortgage is not noticed at all in this conveyance, and the covenants and provisoes are framed in general terms, in order to prevent any difficulty on a subsequent sale. If the purchaser is a responsible person, this may be done without any moral fraud on the second mortgagee, because the purchaser himself would of course be answerable to him for the consequence of a sale to a purchaser without notice. Perhaps the first mortgagee, if he had distinct notice of the second mortgage, might reasonably object to convey the legal estate by an instrument which did not contain any reference to or saving of the second mortgage. The above form may be used without alteration where there is no second mortgage known to the purchaser.]

As to noticing second mortgage.

29. BY MORTGAGOR AND MORTGAGEE, AND ASSIGNMENT OF DEBT TO A TRUSTEE TO ATTEND.

chaser] hath contracted with the said [*vendor*] for the purchase of the said manors and hereditaments, subject to the above

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Merger of mortgage debt.

der the mortgage, (infra, p. 222). As to all charges, then, of which the purchaser had notice, the relation between him and the vendor is that of principal and surety. To allow, therefore, the purchaser, by resorting to the security which, as between himself and his vendor, he has extinguished, to throw upon the vendor that burthen which he is impliedly bound to exonerate him from, would be contrary to all the principles of equity; and, on this ground, the decisions in *Brown* v. *Stead* and *Smith* v. *Phillips*, at least, may be satisfactorily rested; and *Parry* v. *Wright*, though a harder case, could not, perhaps, have been differently decided. A vendor ought not to be allowed this equity, unless he has himself acted with good faith; and therefore, although, as between adverse incumbrancers, constructive notice is deemed equivalent to actual knowledge, it may well be doubted whether the vendor, who is bound to give direct notice to the purchaser, and who has neglected to perform that duty, should be heard to insist, as in *Toulmin* v. *Steere*, on that fictitious notice which was invented only for the protection of innocent parties. And as the vendor's equity to exoneration cannot be extended to a judgment, (ante, p. 127), the decision in *Greswold* v. *Marsham* appears to be equally indefensible on this ground.]

Whether equity adopts the technical principle of merger.

[It should be observed, however, that in none of the cases does the decision appear to have been expressly rested upon the ground here suggested. They were all founded on the general principle of merger. But that that principle alone would not have been sufficient to decide the question, is evident from all those cases in which the question between *volunteers*, whether, by the union of the right to the inheritance with the right to a particular charge on it, the latter had merged for all purposes, was always discussed with reference either to the *intention* of the party in whom or by whose act such union took place, or to the preference which is awarded to creditors over mere volunteers. "Upon this subject," said Sir *W. Grant*, in *Forbes* v. *Moffat*, 18 Ves. 384, ante, Vol. 5, p. 455, "a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it where at law it would be merged." See 1 Sand. Us. 305, 4th ed.; *Donisthorpe* v. *Porter*, 2 Eden, 163; *Thomas* v. *Kemeys*, 2 Vern. 348; *D. of Chandos* v. *Talbot*, 2 P. Wms. 604; *Says* v. *Price*, Barnard. 117; 1 Russ. 197: *Chester* v. *Willes*, Amb. 246; *Lord Compton* v. *Lord Oxenden*, 2 Ves. jun. 261; *Earl of Buckingham* v. *Hobart*, 3 Swanst. 199; *Redington* v. *Redington*, 1 Ball. & B. 131; *Smith* v. *Frederick*, 1 Russ. 174; *Astley* v. *Milles*, 1 Sim. 298; *Tyler* v. *Lake*, 4 Sim. 351; *Trevor* v. *Trevor*, 2 Myl. & K. 675; *Lord Selsey* v. *Lord Lake*, 1 Beav. 146; *Hood* v. *Phillips*, 3 Beav. 513; *Farrow* v. *Rees*, 4 Beav. 18; *Earl of Clarendon* v. *Barham*, 1 You. & C. C. C. 688. See, too, *Aldridge* v. *Westbrook*, 5 Beav. 188; ante, p. 127. And see *Ascough* v. *Johnson*, 2 Vern. 66; *Morrett* v. *Paske*, 2 Atk. 54, and the other cases on buying up incumbrances at a composition, ante, Vol. 5, p. 455.]

[It may deserve consideration, whether the principle in question is affected by the cases in which the conduct of the mortgagee after fore-

recited mortgage security, but free from all other charges and incumbrances whatsoever, at or for the price or sum of £4000.

29. BY MORTGAGOR AND MORTGAGEE, AND ASSIGNMENT OF DEBT TO A TRUSTEE TO ATTEND.

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closure has been held to open the foreclosure. The cases in question, cited ante, Vol. 5, p. 405, (and see *Dyson* v. *Morris*, 1 Hare, 427; *Bentinck* v. *Williams*, 2 Id. 1), appear to have settled, that the mortgagee, after a decree for foreclosure has been inrolled, may sue the mortgagor upon his covenant, bond, or other security, and that the foreclosure is thereby opened†, unless the estate has been previously sold to a third person, and then the mortgagee will be enjoined from proceeding against the mortgagor, although the sale produced less than his debt. If the mortgagee will be allowed to waive the foreclosure, and proceed against the mortgagor while the estate remains in himself, it is difficult to see why he may not waive the foreclosure as against a previous incumbrancer with whom he has made no contract, and who stands in the same position as the mortgagor, and proceed against the mortgagor indirectly, by means of such incumbrancer. And if this analogy will hold in the case of a foreclosure, there seems to be no solid reason against extending it to the case of a purchase of the equity of redemption, at least by the mortgagee himself. The principle might be further tested, by putting the case of a mere charge of a portion on a mortgaged estate, made by marriage settlement, with notice of the mortgage, and without creating any personal debt. Would the claimant under the settlement have any remedy against the mortgagee who had purchased the equity of redemption, except upon the terms of redeeming him? Again, unless the cases are founded exclusively on a regard to the rights of the mortgagor, the rule should apply where a first mortgagee takes a further charge, with notice of an intervening incumbrance; yet it is clear that there is no merger in this case. Ante, Vol. 5, p. 442. See *Milne* v. *Walton*, 2 You. & C. C. C. 354.]

Merger of mortgage debt.

[To apply what has been said to practice: if a stranger purchase the equity of redemption with express notice of the mesne charges, the regular course as to them will be, either at once to pay them off, or to retain a sufficient portion of the purchase-money and expressly to covenant to pay them. As to those charges, the intention always is that the vendor shall be exonerated. If the mortgagee himself purchase the equity of redemption for something beyond the amount of his own and the other charges of which he has notice, the case is the same. A purchase for something beyond his own mortgage-money, and less than the amount of the puisne charges, is of course out of the question, unless the incumbrancers join in the sale. If the value of the estate is considered to fall short of, or not to exceed, the amount of the first mortgage, and the mortgagee simply takes a conveyance of the equity of redemption in consideration of releasing the

Practical deductions.

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† [In *Cook* v. *Sadler*, 2 Vern. 235, a first mortgagee, after foreclosing the second mortgagee, devised the premises to the mortgagor: the second mortgagee was let in to redeem. See *Bovey* v. *Smith*, 1 Vern. 60, 84, 144; 2 Ch. Cas. 124: *Kennedy* v. *Daly*, 1 Sch. & Lef. 379.]

29. BY MORTGAGOR AND MORTGAGEE, AND ASSIGNMENT OF DEBT TO A TRUSTEE TO ATTEND.

Of contract for transfer of mortgage;

—agreement for assignment of mortgage debt as a protection.

AND WHEREAS the said [*purchaser*] hath agreed with the said [*mortgagee*] for the purchase of the said mortgage debt or sum of £5125, and of all future interest to accrue due in respect of the said principal sum of £5000, and of the said charge of or mortgage security for the same upon the said manors and hereditaments; and upon the contract for such purchase it was agreed, with the privity and consent of the said [*vendor*], that the said mortgage debt and security, so far as regards the said manors and hereditaments, and for the protection of the said [*purchaser*], his heirs and assigns, from all mesne charges, incumbrances, and demands, if any there be, as well those (if any) whereof the said [*purchaser*] has or may have or be held to have actual or constructive notice, as those (if any) whereof he hath no notice, should be assigned to the said [*trustee*], his executors, administrators, and assigns, in manner hereinafter expressed; and that the said manors and hereditaments should be conveyed or assured unto the said [*purchaser*] and his heirs, to the uses and in manner hereinafter expressed. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said

Testatum.

Precautions to be taken on purchasing an equity of redemption.

debt, it is then probably the meaning of the parties that the mortgagor shall remain personally liable to the puisne incumbrancers, and that, as against them, the mortgagee shall retain his priority. And in all cases of a purchase of an equity of redemption, it is of course the intention of the purchaser to be protected from all mesne incumbrances of which he has only *constructive notice*. An express stipulation with the vendor would, upon principle, be sufficient to secure this protection, as in the cases where a creditor, giving time to the debtor, reserves his remedies against the sureties; (ante, Vol. 3, p. 303); but, as the true foundation of the decisions is involved in some doubt, and as in some of the cases a technical efficacy appears to have been attributed to the form of keeping the security distinct from the ownership, it is proper, by way of further caution, to take an assignment of the debt to a trustee; and some practitioners, for still greater assurance, convey the legal estate also to the trustee. Even where the equity of redemption is purchased by the mortgagee himself, and no agreement has been signed, this course may be pursued, although it can scarcely be anticipated that any weight would be attributed to so absurd a ceremony, or that, in that case at any rate, an express reservation of priority would not be sufficient. It may be prudent, in every case where a mortgage or other incumbrance is satisfied, to guard against the danger of constructive notice of mesne charges by an express proviso. Vide ante, p. 206, n.; infra, pp. 222, n., 226, n.]

Stamp.

[The transfer of the debt will not render the deed liable to a deed stamp, in addition to the ad valorem stamp. Vide ante, Vol. 5, p. 540.]

29. BY MORTGAGOR AND MORTGAGEE, AND ASSIGNMENT OF DEBT TO A TRUSTEE TO ATTEND.

several agreements, and in consideration of the sum of £5125 by the said [*purchaser*] to the said [*mortgagee*] in hand paid, at or immediately before the sealing and delivery of these presents, (the receipt of which sum of £5125, being the full amount of principal and interest monies now due to him by virtue of the above-recited mortgage security, he the said [*mortgagee*] doth hereby acknowledge, and from the same and every part thereof Doth acquit, release, and for ever discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, and also the said [*trustee*], his executors, administrators, and assigns), he, the said [*mortgagee*], at the request and by the direction as well of the said [*vendor*] as of the said [*purchaser*], (testified by their respectively executing these presents), DOTH by these presents bargain, sell, assign, transfer, and set over unto the said [*trustee*], his executors, administrators, or assigns, ALL THAT the aforesaid principal sum of £5000, and also all that the said sum of £125, arrears of interest money, so as aforesaid respectively due and owing to him the said [*mortgagee*], under or by virtue of the above-recited indenture of mortgage, upon the security of the said manors and hereditaments, and also all future interest to grow due in respect of the said principal sum of £5000, and the full benefit of the charge and security thereof upon the said manors and hereditaments so as aforesaid made and created by the said indenture of mortgage (*c*); And all the right, title, interest, property, benefit, claim, and demand whatsoever, both at law and in equity, of him the said [*mortgagee*] in, to, of, or upon the same sum and sums of money, and premises, and every of them, and every part thereof, [together with full power and authority to and for the said [*trustee*], his executors, administrators, or assigns, as the attorney or attornies, and in the name or names of the said [*mortgagee*], his executors or administrators, to demand, sue for, recover, receive, and give effectual releases, receipts, and discharges for the said sum or sums of

Mortgagee assigns mortgage debt to trustee.

Power of attorney.

(*c*) [In an ordinary transfer of the mortgage, the assignment would here include the full benefit of the covenant to pay the mortgage debt contained in the mortgage; but these words would be improper here, where the object is to exonerate the mortgagor from all direct personal responsibility, and to preserve the charge only as against the lands. However carefully the deed is framed, it is impossible to avoid inconsistencies and absurdities, the necessary consequence of the existing uncertainty as to the principle on which the cases have proceeded.]

29. BY MORTGAGOR AND MORTGAGEE, AND ASSIGNMENT OF DEBT TO A TRUSTEE TO ATTEND.

money and premises, or any of them, or any part thereof (*d*)]; To HAVE, hold, receive, and take the said sum and sums of money and premises unto the said [*trustee*], his executors, administrators, and assigns, to the intent that the same may be kept on foot, unmerged and available, and upon trust to assign and dispose of the same as the said [*purchaser*], his heirs or assigns, shall from time to time direct, and in the mean time to permit and suffer the same to wait upon and attend the freehold and inheritance of the said manors and hereditaments intended to be hereby assured, and to protect the same from all mesne charges, incumbrances, and claims, (if any such there be), as well those (if any such there be) whereof the said [*purchaser*] hath or may have or be held to have any actual or constructive notice, as those (if any such there be) whereof the said [*purchaser*] hath not any notice. And the said [*mortgagee*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*trustee*], his executors, administrators, and assigns, that he the said [*mortgagee*] hath not at any time heretofore committed, or suffered, been party or privy to, any act or default, whereby or by reason or means whereof he is in anywise prevented from assigning the said sum and sums of money and premises in manner aforesaid, according to the true intent and meaning of these presents, or whereby or by reason or means whereof the same sum and sums of money and premises, or any of them, or any part thereof respectively, are, is, can, shall, or may be released, impeached, charged, incumbered, or prejudicially affected in any manner howsoever. AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said agreements, and in consideration of the premises and of the sum of £4000 by the said [*purchaser*] to the said [*vendor*] in hand paid at or immediately before the sealing and delivery of these presents, (the receipt of which sum of £4000, being in full for the purchase of the equity of redemption of and all other the estate and interest of the said [*vendor*] in the said manors and hereditaments, he the said [*vendor*] doth hereby acknowledge, and from the same and every part thereof Doth acquit, release, and for ever discharge the said [*purchaser*], his heirs, executors, administrators, and assigns), he

Habendum of mortgage debt, in trust to attend the freehold.

Covenant by mortgagee with trustee against incumbrances.

Further testatum.

Release by mortgagor and vendor to purchaser of freeholds.

(*d*) [This power is quite superfluous.]

29. BY MORTGAGOR AND MORTGAGEE, AND ASSIGNMENT OF DEBT TO A TRUSTEE TO ATTEND.

the said [*mortgagee*], at the request and by the direction of the said [*vendor*], DOTH, by these presents, made &c., (*ut ante, p.* 72), bargain, sell, and release, and he the said [*vendor*] DOTH grant, bargain, sell, release, ratify, and confirm unto the said [*purchaser*] and his heirs, ALL (*parcels and general words, ut ante, p.* 200); TO HAVE AND TO HOLD the said manor, hereditaments, and premises intended to be hereby released unto the said [*purchaser*] and his heirs; *To such uses* (*e*) and in such manner as the said [*purchaser*] shall by any deed appoint, and, subject thereto and in the mean time, *to the use* of the said [*purchaser*] and his assigns during his life, without impeachment of waste, with remainder *to the use* of the said [*trustee*] during the life of the said [*purchaser*], in trust for the said [*purchaser*] and his assigns, with remainder *to the use* of the said [*purchaser*], his heirs and assigns for ever; BUT as to all and every and each of the uses and estates hereinbefore limited, subject to and in trust to secure the hereinbefore-recited charge, and the sum and sums of money hereinbefore assigned. (*Declaration by purchaser against dower, and covenant by mortgagee against incumbrances, ut ante, pp.* 74, 75. *Covenants by vendor for title, and that he and mortgagee, or one of them, have or has power to convey, subject to the mortgage debt, and for quiet enjoyment, free from all incumbrances,* "as well those (if any such there be) whereof the said [*purchaser*] hath or may have or be held to have any actual or constructive notice, as those (if any such there be) whereof he hath not any notice, save and except always the above-recited mortgage security," *and for further assurance, ut ante, p.* 207). [AND it

Habendum.

To uses to prevent dower;

Subject to mortgage debt.

Covenants.

Declaration.

(*e*) [Some gentlemen, for greater caution, convey the legal estate also to the trustee. This does not appear to be called for by any of the authorities, and is open to the objection, that it leaves the legal estate outstanding. If, however, it should be thought expedient to adopt it, the following alteration may be made in the form:—

Variation where the legal estate is conveyed to the trustee.

"To the use of the said [*trustee*], his heirs and assigns for ever, upon trust, in the first place, for securing the said sum or sums of money and premises hereinbefore assigned to the said [*trustee*], his executors, administrators, and assigns, and subject thereto, in trust for the said [*purchaser*], his heirs and assigns, and to be conveyed and disposed of as he or they shall from time to time direct and appoint." (*Declaration against dower, ut ante, p.* 74, *and covenants with the purchaser, &c., ut supra*).]

29. BY MORTGAGOR AND MORTGAGEE, AND ASSIGNMENT OF DEBT TO A TRUSTEE TO ATTEND.

that vendor shall not be liable on mortgage.

is hereby expressly agreed and declared, that the said [*mortgagee*], his heirs, executors, or administrators, shall not, nor shall the said [*trustee*], his executors, administrators, or assigns, or the said [*purchaser*], his heirs, executors, administrators, or assigns, have any direct or personal action, suit, remedy, claim, or demand against or upon the said [*vendor*], his heirs, executors, or administrators, upon, under, or by virtue of the above-recited indenture of mortgage, or any covenant, matter, or thing therein contained, but shall only be entitled to use and insist upon the same as a protection against, and as having priority over, any such mesne charges, incumbrances, and claims as aforesaid, if any such there be (*f*)]. IN WITNESS &c.]

(*f*) [This clause seems to be unnecessary.]

30. EQUITY OF REDEMPTION IN FEE.

30. CONVEYANCE *of an* EQUITY *of* REDEMPTION (*a*), *with* COVENANT *by the* PURCHASER *to* PAY the MORTGAGE-MONEY *and* INDEMNIFY *the* VENDOR.

Parties.

THIS INDENTURE, made &c., BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other

Precautions to be taken by the purchaser of an equity of redemption.

(*a*) The following precautions should be taken by the purchaser of an equity of redemption:—1st. To ascertain, by communication with the mortgagee, that the state of the account between him and the mortgagor is correctly represented by the latter. 2ndly. To obtain the mortgagee's assurance that he has received no notice of any other incumbrance†. 3rdly. To give him (the mortgagee) notice of the purchase. He ought also, it seems, to ascertain that the mortgagee has no mortgage on any other estate of the mortgagor. Vide ante, p. 130, Vol. 5, pp. 436, 473.

As to conveyances of equities of redemption.

It is usual, in transferring an interest of this nature, to employ that mode of conveyance which would be proper to pass the mortgagor's estate, supposing it to be a legal and not an equitable interest. Thus, a mortgagor of freehold lands generally conveys by lease and release, and

† This information the mortgagee would not be bound to give, but his refusal would, of course, excite the apprehensions of the purchaser. [Vide ante, p. 120, n.]

part; WHEREAS, by indentures of lease and release, the latter bearing date respectively on or about the —— day of

30. EQUITY OF REDEMPTION IN FEE.

Recital of mortgage.

of leaseholds by assignment; though the mortgages, if they have taken effect, will, in both instances, have exhausted the whole legal ownership: but it is the possibility of this not being the case, namely, of the mortgage having been inoperative, that has suggested, and can alone justify the practice of transferring equitable interests by conveyances adapted to convey *legal* estates. Vide ante, Vol. 6, p. 237. Probably the practice has, in some degree, sprung from, and been kept in countenance by, the fact, that equitable interests have, in some cases, been *necessarily* made the subjects of assurances adapted to legal *estates*, as fines and common recoveries; the former of which were requisite in order to pass the equitable freehold interests of married women, and the latter to bar equitable entails, for reasons which do not impugn the general doctrine here contended for. And inrolled conveyances are, under the new law, made necessary for barring entails in equitable interests in freehold property. Conducive to the same end is the *fiscal* regulation, which imposes the ad valorem stamp on the conveyance, instead of placing it upon the contract, which is the only really operative instrument, where the subject of the contract is an equity of redemption. The universality of the practice, however, of treating an equity of redemption as the land itself, for the purposes in question, should not induce us to lose sight of the actual nature of the property, which is nothing more than the right (though often a valuable one, no doubt) to call upon the mortgagee to convey the legal estate on payment of the mortgage debt; and this right may pass by *any* instrument capable of operating as an equitable transfer.

If, therefore, the purchaser of an equity of redemption has a written contract, which would be binding on the vendor in a court of equity, and which is in that court regarded as an alienation, he has all which the vendor can transfer to him, and the subsequent more formal conveyance usually taken is absolutely nugatory. See *Staines* v. *Morris*, 1 Ves. & B. 8. It is probable, however, that the purchaser would not be entitled to make use of the contract to enforce the equity of redemption against the mortgagee, unless it were stamped as a "conveyance;" and the contract often does not shew the payment of the purchase-money. The vendor would, it should seem, also be entitled to call upon the purchaser to enter into a covenant for payment of the mortgage-money, and would himself be bound to enter into covenants for the title. For some of these purposes a further *deed* between the parties is requisite, for all of them it is convenient: and therefore, though the conveyance by lease and release, usually made for the purpose of passing an equity of redemption, is inoperative *as such*, and, where there is a previous binding contract, has not even the operation of an agreement, yet, as the release contains much that is useful for other purposes, it is not to be condemned as wholly supererogatory. Convenience is often consulted by adhering to established forms, even where the judgment does not completely approve them. [See 2 Hayes' Introd. Conv. 103, n. Under the stat. 11 Geo. 4 & 1 Will. 4, c. 60, ante, Vol. 6, p. 430, for the conveyance of estates vested in trustees, neither a vendor nor a trustee for a vendor is a

30. EQUITY of REDEMPTION IN FEE.

——, made between the said [*vendor*], of the one part; and [*mortgagee*], of &c., of the other part; in consideration of the sum of £500 to the said [*vendor*] paid by the said [*mortgagee*], the said [*vendor*] did release (*b*) and confirm unto the said [*mortgagee*], his heirs and assigns, the messuage or tenement, lands and hereditaments, hereinafter described and intended to be hereby granted and released, with their appurtenances; *To hold* the same unto and to the use of the said [*mortgagee*], his heirs and assigns for ever, subject to a proviso in the said indenture of release contained for the redemption of the premises upon payment by the said [*vendor*], his heirs, executors, administrators, or assigns, unto the said [*mortgagee*], his executors, administrators, or assigns, of the sum of £500 and interest, on the —— day of —— then next ensuing. AND WHEREAS the said principal sum of £500 still remains owing upon the aforesaid security, but all interest in respect thereof hath been duly paid up to the day of the date of these presents (*c*), as the said [*vendor*] doth hereby testify and declare. AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the said messuage or tenement, lands, and hereditaments, and the inheritance thereof in fee-simple, (subject nevertheless to the payment of the said principal sum of £500, secured by the said indenture of mortgage as aforesaid), at or for the price or sum of £600; which several sums of £500 and £600 make together the sum of £1100 (*d*). NOW THIS IN-

Money due.

Contract for purchase, subject to mortgage.

Testatum.

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trustee for the purchaser. See *King* v. *Leach*, 2 Hare, 57. However, where an equitable mortgagee had obtained a sale by order of the court, the mortgagor, who had become of unsound mind, was held to be a trustee within that act. *Barfield* v. *Rogers*, 8 Jur. 229, L. C.]

Appointment may be disused in conveying an equity of redemption.

(*b*) In this case it is supposed that the vendor, previously to the mortgage, was simply seised in fee. If he were entitled under the ordinary uses to prevent dower, some practitioners would make the conveyance of the equity of redemption by appointment and lease and release, on the ground that such would have been the mode of assurance if the estate were unaffected by the mortgage, which is the hypothesis on which the practice of taking a conveyance is founded; but as, in all probability, the whole legal ownership is in the mortgagee under the mortgage, leaving nothing, therefore, for either the appointment or lease and release to operate upon,—and even if it were not, the lease and release would be quite adequate to pass the whole fee, (with the exception of that particle of interest which is outstanding in the dower-trustee, unless he concurs),—the deed ought not to be clogged with an appointment in addition to the release.

(*c*) The purchaser will, of course, ascertain this fact.

(*d*) This is the sum on which the ad valorem duty must be paid.

30. EQUITY OF REDEMPTION IN FEE.

DENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £600 sterling to the said [*vendor*] paid by the said [*purchaser*] at or before the sealing and delivery of these presents, the receipt &c., and in consideration of the covenant hereinafter contained on the part of the said [*purchaser*], his heirs, executors, and administrators, he the said [*vendor*] *Doth* by these presents (made &c., *ut ante, p.* 72 (*e*)), grant, bargain, sell, release, and confirm unto the said [*purchaser*] and his heirs: ALL THAT &c.; And all houses, &c.; And the reversion, &c.; And all the estate, &c., (*ut ante, p.* 73); TO HAVE AND TO HOLD the said messuage or tenement, pieces or parcels of land, hereditaments, and all and singular other the premises hereinbefore described and expressed to be hereby granted and released, with their rights, members, and appurtenances, (subject to and charged and chargeable with the payment of the said principal sum of £500, due and owing upon or by virtue of the said security), unto the said [*purchaser*] and his heirs for ever; TO THE USE of the said [*purchaser*], his heirs and assigns for ever. And the said [*purchaser*] doth hereby declare, that, in case he shall die leaving a widow, such widow shall not be entitled to dower in or to the said hereditaments and premises expressed to be hereby granted (*f*): (*Add covenants by vendor, that, subject to the mortgage, he is lawfully entitled, has power to convey, free from incumbrances, and for further assurance*). And in consideration of the premises, he the said [*purchaser*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*vendor*], his heirs, executors, and administrators, That he the said [*purchaser*], his heirs, executors, administrators, or assigns, will or shall pay or cause to be paid unto the said [*mortgagee*], his executors, administrators,

Consideration.

Grant.

Parcels.

Habendum.

Purchaser covenants

—to pay the mortgage-money;

(*e*) [As the legal estate is here outstanding in the mortgagee, so that the vendor has nothing to convey beyond a mere equity, the purchaser, if he has ascertained that the mortgage deed was duly executed so as to pass the legal estate, and is desirous of saving expense, may safely dispense with this reference to the statute, and with the lease for a year stamp.]

(*f*) As under the recent statute dower attaches on equitable interests of inheritance in land, (supposing the dowress's claim to be founded on a marriage subsequent to the 1st of January, 1834), it is proper to introduce a negative declaration to this effect into the conveyance of even an equity of redemption, if the purchaser's intention is to exclude the dower.

30. EQUITY OF REDEMPTION IN FEE.

or assigns, the principal sum of £500 hereinbefore mentioned to be secured, and due and owing to the said [*mortgagee*] upon or by virtue of the said indenture of mortgage of the —— day of —— aforesaid; And all interest which shall hereafter grow due in respect thereof: And that he the said [*purchaser*], his heirs, executors, administrators, and assigns, will and shall, at all times hereafter, effectually keep harmless and indemnified the said [*vendor*], his heirs, executors, and administrators, and his and their lands and tenements, goods and chattels, from and against the said principal sum of £500, and all interest thereon as aforesaid; *And also* from and against all and all manner of actions, suits, and other proceedings whatsoever, which at any time or times hereafter shall or may be brought, had, commenced, or prosecuted against the said [*vendor*], his heirs, executors, or administrators; And also all costs, charges, damages, and expenses, which he or they shall or may bear, pay, sustain, expend, be at, or be put unto, for or by reason of the non-payment of the said principal sum of £500 and interest as aforesaid (*g*). (*h*) AND lastly the said [*purchaser*] doth hereby

—and to indemnify vendor therefrom.

Purchaser of equity of redemption bound to pay mortgage debt.

(*g*) Though it should seem that a vendor is entitled to a covenant of this nature, yet, independently of express contract, the purchaser of an equity of redemption would be bound to indemnify the vendor against the mortgage debt; for, having become owner of the estate, equity raises in him an obligation to take on himself its burthens. See Lord *Eldon's* judgment in *Waring* v. *Ward*, 7 Ves. 337, ante, Vol. 5, p. 370. But, where a covenant has been entered into, the purchaser's liability is regulated and fixed by the extent of such covenant. Upon this principle, it has been held, that, where a purchaser had entered into a covenant with the vendor to pay a mortgage debt, to which a third person was liable as surety for him, (the vendor), and who afterwards paid the debt, the surety could not maintain an action of assumpsit against the purchaser, he being only liable to be sued upon his covenant of indemnity with the vendor; though it was admitted, that, if the mortgagor had simply transferred his interest to the purchaser, without any such covenant, the latter would have stood in his place as principal debtor, and the surety would have had the ordinary rights and remedies of a surety creditor against him. *Crafts* v. *Tritton*, 2 J. B. Moore, 411; 8 Taunt. 365. Sometimes, a separate deed or bond of indemnity is taken from the purchaser, because the purchase deed, which would otherwise contain the covenant, goes into the custody of the purchaser.

(*h*) [It may be proper here to provide against the doctrine in *Toulmin* v. *Steere*, 3 Meriv. 210; ante, p. 210, by inserting the following clause:— "PROVIDED ALWAYS, and it is hereby declared, that the said [*purchaser*], his heirs and assigns, having paid off the said

direct and declare, that, as between his real and personal representatives, the said messuage or tenement, lands, hereditaments, and premises mentioned to be hereby released shall be and be deemed and considered to be the primary fund for the payment and satisfaction of the said mortgage debt (*i*). In witness &c.

30. EQUITY OF REDEMPTION IN FEE.

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principal sum of £500 and interest, shall in respect thereof stand in the place of the said [*mortgagee*], his executors, administrators, or assigns, and that, for the purpose of protection from all mesne charges, incumbrances, or claims, (if any such there be), and notwithstanding any actual or constructive notice thereof, the said [*purchaser*], his heirs and assigns, shall be entitled to treat the same debt or sum of £500, and all arrears of interest, and all future interest thereon, as still on foot and subsisting, unmerged in the equity of redemption of the said hereditaments, and available, any rule or doctrine of equity to the contrary notwithstanding."]

Declaration that mortgage debt shall not merge.

(*i*) This declaration indicates the intention on a point which is often a subject of dispute. Vide ante, Vol. 5, p. 369, *Earl of Clarendon* v. *Barham*, 1 You. & C. C. C. 688.

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31. CONVEYANCE *in* FEE *where the* MORTGAGEE PURCHASES *the* EQUITY *of* REDEMPTION (*a*).

31. ON PURCHASE BY A MORTGAGEE IN FEE.

THIS INDENTURE, made the —— day of ——, Between [*mortgagee*], of &c., of the first part; [*vendor*], of

Parties.

(*a*) Vide ante, p. 218. Where a mortgagee in fee purchases the equity of redemption, if the object were merely to vest the equity of redemption in him, this might be done by a simple release to him of such equity; but if it were intended to limit the estate to uses for preventing dower, a conveyance in the present form would be requisite. If, however, the mortgagee has previously contracted in writing for the purchase of the equity of redemption, (and the same principle of course would extend to a parol contract, which part performance has rendered obligatory), it should seem that such contract, by clothing the legal inheritance of the mortgagee with the equitable title, *would let in his wife's dower*. The conveyance in the text is necessarily made to a third person as releasee to uses, the mortgagee being himself a granting party.

Nature of the assurance where a mortgagee purchases the equity of redemption.

The ad valorem stamp must, of course, cover the whole purchase-money, including the mortgage debt, which is released. The Stamp Act leaves it in doubt whether the release of a debt not secured by a mortgage of

Whether an ad valorem duty attaches on a conveyance in

31. ON PURCHASE BY A MORTGAGEE IN FEE.

&c., of the second part; and [*releasee to uses, being also dower-trustee*], of &c., of the third part; (*Recite mortgage; and that principal money is owing, ut ante*, p. 204): AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the (*b*) hereditaments hereby assured, and the inheritance thereof in fee-simple, free from the aforesaid mortgage debt, and all other incum-

Recital of contract.

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consideration of the release of a debt.

the purchased property is such a consideration as would subject the conveyance to an ad valorem duty. It is certainly not money, and may be much less valuable; for, obviously, a debt of 500*l.* may not be worth 50*l.* This circumstance, coupled with that of the Legislature having so expressly and anxiously declared that a *mortgage* debt shall be considered as purchase-money, renders it highly probable that the duty would be held not to attach in the instance suggested. And this view of the point derives some confirmation from its having been decided that a grant of an annuity, in consideration of a release of a debt, did not require inrolment under the stat. 17 Geo. 3, c. 26, which applied only to annuities granted in consideration of money. *Frost* v. *Frost*, 3 B. & Ad. 612, n.; ante, Vol. 2, p. 108. In general, however, a person acts more wisely in paying the additional duty, than in avoiding it at the risk of having the sufficiency of the stamp questioned.

(*b*) [If the precaution suggested, ante, p. 214, is adopted, the deed will proceed thus:—

Recital of contract.

"AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the equity of redemption of the said hereditaments, subject to the aforesaid mortgage debt, but free from all other incumbrances, at or for the price or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration that, from the payment of the said sum of £—— so as aforesaid due and owing from the said [*vendor*] to the said [*purchaser*], and from all claims and demands in respect thereof, or otherwise by virtue of the covenants contained in the herein-beforerecited indenture of mortgage, the said [*purchaser*] doth hereby absolutely acquit, release, and discharge the said [*vendor*], his heirs, executors, administrators, and assigns, but not the hereditaments intended to be hereby assured; and also in consideration of the sum of £—— of lawful British money paid by the said [*purchaser*] to the [*vendor*] at or immediately before the execution of these presents, the payment in manner aforesaid of which sum of £—— (making together with the said mortgage debt or sum of £——, the gross sum of £——) the said [*vendor*] doth hereby acknowledge, and therefrom doth" &c.]

In consideration of release from mortgage-money, and of a further sum paid by purchaser to vendor, purchaser and vendor convey to releasee to uses.

31. ON PURCHASE BY A MORTGAGEE IN FEE.

brances, at or for the price or sum of £——; And it hath been agreed that out of the said purchase-money the said [*purchaser*] shall retain the said principal sum of £——, owing to him by virtue of the hereinbefore-recited mortgage, in satisfaction of his said mortgage debt. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of the sum of £—— so as aforesaid due and owing from the said [*vendor*] to the said [*purchaser*], from the payment of which sum, and from all claims and demands in respect thereof, and otherwise by virtue of the covenants contained in the hereinbefore-recited indenture of mortgage, the said [*purchaser*] doth hereby absolutely acquit, release, and discharge the said [*vendor*], his heirs, executors, administrators, and assigns; And also, in consideration of the further sum of £—— of lawful British money paid by the said [*purchaser*] to the said [*vendor*] at or immediately before the execution of these presents, the payment and receipt in manner aforesaid of which several sums of £—— and £—— (making together the said purchase-money or sum of £——) the said [*vendor*] doth hereby acknowledge, and therefrom doth absolutely discharge the said [*purchaser*], his heirs, appointees, executors, administrators, and assigns; And also, in consideration of 10*s.* of like lawful money at the same time paid by the said [*releasee to uses*] to the said [*vendor*] and [*purchaser*] respectively, the receipt whereof is hereby acknowledged, he the said [*purchaser*], with the consent and approbation of the said [*vendor*], testified by his execution hereof, *Doth* by these presents, made &c., (*ut ante, p.* 72 (*c*)), bargain, sell, and release; And the said [*vendor*], at the request, and on the nomination of the said [*purchaser*], testified as aforesaid, *Doth* grant, bargain, sell, release, and confirm unto the said [*releasee to uses*] and his heirs (*parcels and general words*); *And also* all the estate, right, title, interest, benefit and equity of redemption, claim and demand whatsoever, both at law and in equity, of the said [*purchaser*] and [*vendor*], and each of them, in, to, or upon the said ——, hereditaments, and premises, with their appurtenances (*d*): TO HAVE AND TO

That mortgage debt is to be retained out of the purchase-money.

Testatum.

In consideration of mortgage-money, and a further sum paid by purchaser to vendor, purchaser and vendor convey to releasee to uses.

Parcels, and all the estate, &c.

Habendum.

(*c*) [See note, ante, p. 221, n. When the legal estate is to be conveyed to uses as in the text, the course there suggested cannot be adopted.]

(*d*) The grant of the deeds is omitted, for the reasons given ante, p. 88.

31. ON PURCHASE BY A MORTGAGEE IN FEE.

HOLD the said —— and hereditaments, and all and singular the premises hereby released, or intended so to be, with their appurtenances, unto the said [*releasee to uses*] and his heirs for ever, To the several uses, nevertheless, hereinafter declared concerning the same, (that is to say), (*uses to prevent dower, and declaration excluding it, ut ante, p.* 73) (*e*); AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*releasee to uses*] and his heirs, that, notwithstanding any act, deed, matter, or thing whatsoever made or done, or permitted to be made or done, by the said [*vendor*] to the contrary (*f*), the said [*purchaser*] and [*vendor*] are now seised to them and their heirs, or one of them is seised to him and his heirs, of a clear, rightful, absolute, and indefeasible estate of inheritance in fee-simple in possession in the ——, hereditaments, and premises hereby released, or intended so to be; *And also*, that, notwithstanding any such act, deed, matter, or thing as aforesaid, the said [*purchaser*] and [*vendor*] now have in themselves, or one of them now hath in himself, good right and absolute authority by these presents to release or otherwise assure the same ——, hereditaments, and premises unto the said [*releasee to uses*] and his heirs, to the uses and in manner aforesaid, and according to the true intent and meaning of these presents; *And also*, that the ——, hereditaments, and premises hereby released, or intended so to be, shall henceforth, and at all times here-

Covenants by vendor, that, notwithstanding &c., he and mortgagee are seised;

—have right to convey;

—that premises shall remain to uses;

(*e*) [If the mortgage debt is to be kept on foot, add here:—

Proviso that mortgage debt shall not be merged.

"Provided always, and it is hereby declared and agreed, that the said charge or mortgage security of the said principal sum of £——, and of all future interest in respect thereof, shall remain and continue, so far as regards the said hereditaments and premises intended to be hereby assured, unmerged, and available as a protection against all mesne charges, incumbrances, and claims whatsoever, (if any such there be), as well those (if any such there be) whereof the said [*purchaser*] hath or may have or be held to have any actual or constructive notice, as those (if any such there be) whereof he hath not any notice, any thing herein contained and any rule or doctrine of equity to the contrary notwithstanding."]

(*f*) As the vendor has not the legal estate, these covenants, according to the general opinion, would not run with the land. Sed quære.

31. ON PURCHASE BY A MORTGAGEE IN FEE.

after, remain and be to the uses and upon the trusts hereinbefore expressed concerning the same, and that the same hereditaments and premises shall be at all times for ever hereafter peaceably and quietly held and enjoyed, and the rents and profits thereof received and taken accordingly, without any eviction, interruption, or denial whatsoever from or by the said [*vendor*] or his heirs, or from or by any person or persons whomsoever having or rightfully claiming any estate, right, title, or interest, at law or in equity, in, to, or out of the said ——, hereditaments, and premises, or any part thereof, from, through, under, or in trust for him or them: *And that* free and clear, or freely, clearly, and absolutely discharged, or by the said [*vendor*], his heirs, executors, or administrators, effectually saved harmless and kept indemnified from or against all former or other estates, rights, titles, charges, and incumbrances whatsoever, made, created, or occasioned by the said [*vendor*], or any person or persons lawfully claiming from, through, under, or in trust for him or them, or by the acts, defaults, privity, or procurement of him or them or of any of them; *And lastly,* that the said [*vendor*] and his heirs, and every person whosoever rightfully claiming any estate, right, title, charge, or interest, at law or in equity, in, to, or out of the ——, hereditaments, and premises hereby released, or intended so to be, or any part thereof, from, through, under, or in trust for him or them, will and shall at any time or times hereafter, upon every reasonable request, and at the costs and charges of the said [*purchaser*], his heirs, appointees, or assigns, make, do, execute, and perfect every such lawful act, deed, conveyance, or assurance in the law whatsoever, for more effectually or satisfactorily granting, releasing, confirming, or otherwise assuring the said ——, hereditaments, and premises, or any part of the same, to the uses aforesaid, or otherwise, as the said [*purchaser*], his heirs, appointees, or assigns, shall order or direct, as by the said [*purchaser*], his heirs, appointees, or assigns, or his or their counsel in the law, shall be advised and required (*g*). IN WITNESS &c.

—free from incumbrances;

—and for further assurance.

(*g*) If a distinct grant of the deeds be executed agreeably to the suggestion, ante, p. 88, add—

"AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the hereinbefore recited contract for purchase, and in consideration of the premises, the

Further testatum.

Grant of title-deeds.

31. ON PURCHASE BY A MORTGAGEE IN FEE.

said [*vendor*] *Doth* by these presents grant unto the said [*purchaser*], his heirs, appointees, and assigns, *All* and singular the deeds, evidences, and writings relating to the title of the hereditaments hereby released, or intended so to be, now in the custody of the said [*vendor*], or which he can procure without suit, except only such deeds, evidences, and writings as relate to the said hereditaments jointly with any other hereditaments belonging to the said [*vendor*], or which he has covenanted to produce to any other person or persons before the execution of these presents."

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32. RELEASE OF EQUITY OF REDEMPTION INDORSED.

32. [RELEASE *by* MORTGAGOR *to* MORTGAGEE *of the* EQUITY OF REDEMPTION *of* FREEHOLDS *which were* MORTGAGED *in* FEE, *in* CONSIDERATION *of the* MORTGAGE DEBT *and a considerable* ARREAR *of* INTEREST; INDORSED *on the* MORTGAGE DEED. (*A short form*).

TO ALL TO WHOM THESE PRESENTS SHALL COME, THE within-named [*mortgagor*] sendeth greeting: WHEREAS the within-mentioned principal sum of £—— and interest were not paid by the said [*mortgagor*] to the within-named [*mortgagee*], according to the proviso within contained, and the said principal sum of £——, together with an arrear of interest amounting to the sum of £——, now remain due and owing from him the said [*mortgagor*] to the said [*mortgagee*] upon the within-mentioned security;

Recital of default;

—agreement for purchase.

AND WHEREAS the said [*mortgagor*], in consideration of the sum of £——, being the amount so due on the said mortgage security as aforesaid, hath agreed to release to the said [*mortgagee*] all benefit and equity of redemption of or in the within-mentioned messuages, &c., and all his estate and interest therein. NOW THESE PRESENTS WITNESS, that, in pursuance of the said agreement, and in consideration of the said principal sum of £—— and the interest thereof due and owing from him the said [*mortgagor*] to him the said [*mortgagee*], (making together the said purchase-money or sum of £——), (from which principal and interest monies, and all other monies secured by the within-written indenture, he

Testatum.

In consideration of principal and interest monies.

32. RELEASE OF EQUITY OF REDEMPTION INDORSED.

Mortgagor releases equity of redemption to mortgagee and his heirs.

the said [*mortgagee*] doth hereby for ever acquit, release, and discharge the said [*mortgagor*], his heirs, executors, and administrators), He the said [*mortgagor*], for himself and his heirs, *Doth* by these presents remise and release unto the said [*mortgagee*], his heirs, executors, administrators, and assigns, the proviso or condition in the within-written indenture contained, and all benefit and equity of redemption of or in the messuages, hereditaments, and premises within mentioned by virtue thereof, or otherwise howsoever; *And also* all covenants and agreements within contained on the part and behalf of the said [*mortgagee*], his heirs, executors, administrators, or assigns; AND ALSO *Doth* (*a*) grant, bargain, sell, release, ratify, and confirm unto the said [*mortgagee*], his heirs and assigns, All and singular the said messuages, &c. within mentioned, and every part and parcel thereof, with the actual and reputed appurtenances; AND ALSO all the estate, right, title, interest, claim, and demand whatsoever, both at law and in equity, of him the said [*mortgagor*] in, to, or upon the same; TO HAVE AND TO HOLD the said messuages, hereditaments, and premises within mentioned, and every part and parcel thereof, with the appurtenances, unto the said [*mortgagee*], his heirs and assigns, TO THE ONLY PROPER USE and behoof of the said [*mortgagee*], his heirs and assigns for ever, freely and clearly acquitted and discharged of and from all benefit and equity of redemption whatsoever. (*Covenants by vendor, that, notwithstanding &c.* (*b*), *the said mortgagor and mortgagee are or one of them is seised, ut ante, p.* 226; *that the mortgagor hath power to release the premises unto and to the use of the mortgagee; for quiet enjoyment and further assurance. Declaration against merger of the debt, ut ante, p.* 226). IN WITNESS &c.]

Habendum.

(*a*) [If, out of abundant caution, the conveyance is to be fitted to pass the legal estate, (as to which vide ante, p. 221), say—

"by these presents, made &c." (*ut ante, p.* 72).

(*b*) [If the covenants for title in the mortgage deed are properly qualified, (but which is very rarely the case), it will be unnecessary to insert new covenants in this place, and the vendor will then covenant only that he has not incumbered.]

33. APPOINTMENT IN FEE TO SUB-PURCHASER, WITH SURRENDER BY MORTGAGEE.

33. APPOINTMENT *in* FEE *by* VENDOR *to a* SUB-PURCHASER, *by the Direction of the* ORIGINAL PURCHASER, *with the* SURRENDER *of a* TERM *by a* MORTGAGEE (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; [*mortgagee*], of &c., of the second part; [*mesne purchaser*], of &c., of the fourth part; [*sub-purchaser*], of &c., of the fifth part; and [*dower trustee*], of &c., of the sixth part; (*Recite conveyance to vendor to uses to prevent dower, and demise by him to mortgagee for* 1000 *years, to secure* 500*l. and interest; that all interest has been paid, but principal remains due, ut ante, p.* 204); AND WHEREAS the said [*mesne purchaser*] some time since contracted with the said [*vendor*] for the absolute purchase of the hereditaments hereinbefore referred to, and hereinafter described, and the inheritance in fee-simple thereof in possession, free from all incumbrances, at the price or sum of 800*l.* AND WHEREAS the said [*sub-purchaser*] hath since contracted with the said [*mesne purchaser*] for the purchase of the same hereditaments, for a like estate of inheritance in fee-simple in possession, free from all incumbrances, at the price or sum of 1000*l.* AND WHEREAS it hath been agreed, that the said principal sum of 500*l.* owing to the said [*mortgagee*] as aforesaid, by virtue of the hereinbefore-recited indenture of mortgage, shall be paid off and discharged out of the said purchase-money or sum of 800*l.* payable to the said [*vendor*] by virtue of the firstly-hereinbefore-recited contract as aforesaid. AND WHEREAS the said [*mesne purchaser*] and [*sub-purchaser*] have severally requested the said [*vendor*] to limit and assure the said hereditaments to the uses hereinafter express-

Recital of vendor's conveyance and mortgage by him;

—of contract with original purchaser;

—of sub-contract;

—of mortgage-money being to be paid.

Request to vendor to convey.

(*a*) This precedent exemplifies the surrender of a term made by a separate testatum, as the frame of an appointment does not conveniently admit of another assurance being blended with it. [As to the expediency of keeping the mortgage debt on foot, vide ante, p. 209. If that is done, the debt and term may both be assigned to a trustee in trust to attend the inheritance. A perusal of the foregoing precedents, Nos. 29, 30, and 31, will suggest the requisite alterations.]

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ed; and the said [*sub-purchaser*] desires to have the residue of the said term of 1000 years vested in the said [*mortgagee*] merged in the inheritance of the said hereditaments. NOW THIS INDENTURE WITNESSETH, that, in compliance with such request, and in pursuance of the several hereinbefore-recited contracts, and in consideration of the sum of 500*l.* of lawful British money, at or immediately &c. paid by the said [*sub-purchaser*] to the said [*mortgagee*], at the request and by the direction as well of the said [*vendor*] as of the said [*mesne purchaser*], testified by their severally executing these presents, the receipt &c., (*ut ante, p.* 71); And also in consideration of the further sum of 300*l.* at the same time paid by the said [*sub-purchaser*] to the said [*vendor*], at the request and by the direction of the said [*mesne purchaser*], testified as aforesaid, the receipt and payment of which two several sums of 500*l.* and 300*l.*, (making together the said purchase-money or sum of 800*l.*, payable by virtue of the firstly-hereinbefore-recited contract) the said [*vendor*] doth hereby acknowledge, and from the same doth absolutely discharge the said [*mesne purchaser*], his heirs, executors, and administrators, and also the said [*sub-purchaser*], his appointees, heirs, executors, administrators, and assigns: And also in consideration of the further sum of 200*l.* of lawful money aforesaid, at the same time paid by the said [*sub-purchaser*], to the said [*mesne purchaser*], the payment and receipt of which two several sums of 800*l.* and 200*l.* (making together the said purchase money or sum of 1000*l.*, payable by the said [*sub-purchaser*] to the said [*mesne purchaser*] by virtue of the secondly-hereinbefore-recited contract (*b*)) the said [*mesne purchaser*] doth hereby acknowledge, and therefrom doth absolutely discharge the said [*sub-purchaser*], his appointees, heirs, executors, administrators, and assigns; He the said [*vendor*], at the request and by the direction of the said [*mesne purchaser*], and with the consent and approbation of the said [*mortgagee*], testified as aforesaid, by virtue and in execution of the said power or authority given and reserved to the said [*vendor*] by the above-recited indenture of release, and of all other powers and authorities enabling him in this behalf, doth hereby

Testatum.

In consideration of sub-purchase-money paid to mortgagee, vendor, and original purchaser,

—vendor, by the direction of the mesne purchaser, and with the privity of the mortgagee, appoints to uses in favour of sub-purchaser.

(*b*) The ad valorem duty is regulated by the purchase-money payable by the sub-purchaser, whether more or less than the original purchase-money.

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absolutely direct, limit, and appoint, that ALL THAT (*describe parcels*), together with all the rights, members, and appurtenances to the said premises belonging, shall henceforth remain, continue, and be to the uses, upon the trusts, and for the intents and purposes hereinafter declared concerning the same, that is to say, (*uses to prevent dower, and declaration excluding it, ut ante, p.* 73). AND THIS INDENTURE ALSO WITNESSETH, that, in compliance with the aforesaid desire of the said [*sub-purchaser*], and for the considerations hereinbefore expressed, [*And also* in consideration of 10*s.* of lawful money aforesaid paid by the said [*sub-purchaser*] to the said [*mortgagee*] immediately before the execution of these presents, the receipt whereof is hereby acknowledged], the said [*mortgagee*], at the request and by the direction as well of the said [*vendor*] as of the said [*mesne purchaser*], testified by their severally executing these presents, *Doth* by these presents assign, surrender, and yield up (*c*) unto the said [*sub-purchaser*], his heirs and assigns, all and singular the ——, hereditaments, and premises hereinbefore described, and all other the hereditaments and premises which are comprised in or demised by the hereinbefore-recited indenture of demise and mortgage of the —— day of ——, together with all the rights, members, and appurtenances thereunto belonging; *And also* all the estate, right, title, property, interest, claim, and demand whatsoever, both at law and in equity, of the said [*mortgagee*] in or to the said hereditaments and premises, with their appurtenances; *To the intent*, that, by virtue of these pre-

Further testatum.

Mortgagee, by the direction of vendor, surrenders the term to sub-purchaser;

and all the estate, &c.;

to the intent

(*c*) [The purchaser, it will be observed, takes the fee-simple under the appointment, whereas the mortgagee may have derived his term from the estate limited to the vendor in default of appointment; but, as the vendor's reversion is entirely defeated and extinguished by the absolute appointment in fee, there seems to be no obstacle to the merger of the term in the fee limited to the purchaser, though it must be confessed that it would not be easy to give a satisfactory account of the relative situations of an estate taken by way of appointment, and an estate previously derived out of the ownership. Nor is it easy to state the limits of the rule of law which protects estates created by the donee of a power out of his ownership from being overreached and defeated by his appointment. See 1 Sugd. Pow., 5th ed., p. 50; *Bringloe* v. *Goodson*, 6 Scott, 502. Assuming that a term created out of the ownership in fee is not defeated by an appointment of an estate less than the fee, there may be ground for contending that the appointee in such a case would not be in a situation to take a surrender of the term. See the chapter on merger, ante, Vol. 8.]

As to surrendering term where the fee is conveyed by appointment.

sents, the residue now unexpired of the term of 1000 years of and in the said hereditaments and premises created by the hereinbefore-recited indenture of demise or mortgage, and all other the estate, term, and interest of the said [*mortgagee*] therein, by virtue of the said indenture, may merge in the freehold, reversion, and inheritance of the said premises, and be thereby extinguished. (*Covenant by mortgagee with purchaser, that he has not incumbered, ut ante, p.* 106; *by vendor with purchaser, his heirs, appointees, and assigns, that he has power to appoint, &c., ut ante, p.* 159). In witness &c.

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that the term may merge.

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34. CONVEYANCE *by* Appointment, *&c., by* Donees *of a* Power *of* Sale *in a* Marriage Settlement, *with the* Concurrence *of the* Tenant *for* Life, *who* covenants *for the* Title *and for the* Production *of the* Settlement.

34. under a power of sale.

THIS INDENTURE, made the —— day of ——, Between [*vendors*], of &c., of the first part; [*tenant for life*], of &c., of the second part; [*purchaser*], of &c., of the third part; and [*dower-trustee*], of &c., of the fourth part; Whereas, by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, 18—, the release being made between the Right Honourable [A. B.], Esquire, commonly called Lord Viscount F——, (the father of the said [*tenant for life*], of the first part; the said [*tenant for life*], of the second part; the Right Honourable Mary, Lady P——, his wife, of the third part; the said [*vendors*] of the fourth part; and [*trustees of a term*], of &c., of the fifth part; (being the settlement made in pursuance of articles of agreement, dated the —— day of ——, made in contemplation of the marriage between the said [*tenant for life*] and Mary, Lady P——, whose maiden name was Mary D——); certain lands and hereditaments in the county of ——, including, among others, the hereditaments hereinafter appointed and assured, or intended so to be, were limited and conveyed by the said [*father of tenant for life*] (*a*),

Parties.

Recital of marriage settlement.

(*a*) If the vendor's covenants for title are extended to the acts of the settlor—a common, but not very correct practice, especially if the settle-

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To the use of the said [*tenant for life*] and his assigns during his life, without impeachment of waste; with remainder *To the use* of the said [*vendors*] (*b*) and their heirs, during the

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ment contains such covenants—it should appear by the recitals in the settlement from whom the estate proceeds.

As to powers of sale and exchange in settlements.

(*b*) It is usual, in preparing marriage settlements containing the ordinary limitations in strict settlement, and powers, to constitute the same persons releasees to uses, trustees to preserve contingent remainders, and donees of the power of sale and exchange. This combination, though convenient as preventing the increase of parties, seems to have led to some confusion by the neglect accurately to discriminate between the respective characters thus associated in the same individuals; for hence, probably, has arisen the indefensible practice of making the donees of the power of sale not only revoke the uses of the settlement, and appoint to new uses, but also release to the use of the purchaser in fee, though their common-law estate, as the releasees to uses, was instantaneously executed in the cestuis que use, by the operation of the Statute of Uses; and, under the *limitations* of the settlement, they take only a legal estate pur autre vie, expectant on the determination, by forfeiture, of the precedent estate for life, for the purpose of preserving the contingent remainders depending on that estate; which estate of the trustees, as well as the estate of the tenant for life, who is also usually made a granting party in the release, of course, are completely divested by the execution of the powers of revocation and new appointment. The obtaining a conveyance from the tenant for life, indeed, is consistent with, and may seem to be justified (so far as one supererogatory proceeding can justify another), by the practice which has so generally obtained, of adding a lease and release to an appointment by a person seised to the ordinary limitations to prevent dower, being designed to guard against the same risk, namely, the possibility of the appointment from defect of attestation not taking effect, and which certainly is an event less unlikely to happen in the present instance than in the case referred to, since it has been more customary in settlements than in purchase-deeds to require the appointment to be attested in a special manner—a well-intended, but most inconvenient and inefficient expedient for preventing fraud. But the practice of taking a conveyance from the donees of the power of sale cannot be defended upon any such plea. Their estate, as trustees to preserve contingent remainders, is of no real value, and, let it be remembered, was limited to them for a specific purpose, which purpose endures so long as the uses of the settlement remain unrevoked; and, consequently, if the appointment to the purchaser is ineffectual to produce such revocation, (which is the precise event in which the conveyance by the trustees is designed to take effect), they ought not to part with their estate discharged from the trust in question. In every point of view, therefore, their conveyance is improper. It is probable, however, that the practice of making the donees of the power of sale convey as well as appoint has arisen from the circumstance rather of their being releases to uses than of their taking an estate to preserve contingent remainders; a vague and indistinct

Lease and release of power unnecessary.

life of the said [*tenant for life*], *Upon trust* to preserve the contingent remainders; with remainder *To the use* of the

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notion prevailing, that, as such releasees, they had some estate or interest which ought to be conveyed, aided probably by a misconception of the effect of the doctrine maintained by some writers, that the releasees to uses in conveyances creating future and contingent limitations take a possibility of seisin to serve the future uses as they arise; and which, it might be supposed, rendered it proper to transfer by an actual conveyance the seisin which, according to this doctrine, reverts to the releasees upon the execution of the powers of revocation and new appointment. It is scarcely necessary to observe upon the fallacy of such a notion; the seisin of the releasees was completely executed by the statute in the cestuis que use; and even supposing the doctrine of the scintilla juris to be well founded, the estate which reverted to the releasees would, of course, be instantaneously transferred to the new cestuis que use, *i. e.* the appointees, and not any particle of interest would be left in the releasees which would be the object of a conveyance. The scintilla doctrine, however, though supported by the respectable opinion of Mr. Sanders, is rapidly losing ground, and has been so often and so ably discussed by recent writers, that a particular examination of it in this place seems uncalled for.

Not necessary that new trustees should be invested with the seisin.

The junction of the common-law seisin and the powers of sale in the same persons has also given rise to a notion adverted to by the learned author of the "Treatise of Powers," (2 Sugd. Pow., 5th ed., p. 527), that, where the powers of sale and exchange are accompanied by a power of appointing new trustees, and it is declared that the donees of the power (being also trustees to preserve contingent remainders) shall, upon such appointment, vest the estate in the new trustees, they (the new trustees) should have a seisin to serve the uses in the same manner as the old trustees had; for which purposes two conveyances would be necessary: one by the donees of the power, appointing the fee to a stranger; and the other by such stranger, conveying it by lease and release to the new trustees, to the uses of the settlement, which would give them the desired seisin—an object not to be effected by an appointment. And the learned author in question suggests, that, in order to prevent the necessity of this circuity, it might be advisable expressly to declare, in the deed creating the power, that it should not be necessary that the new trustees should be invested with the seisin to serve the contingent uses. But, instead of introducing this clause, would it not be better, in framing the settlement, either to avoid the expressions which have given rise to the objection, namely, the direction to convey to the new trustees, or, which it should seem would be equivalent, to vest the seisin and the power in different persons? It could scarcely *then* be contended that the new donees of the power were to have a seisin which their predecessors never had. But the objection which this expedient is intended to obviate appears to be wholly untenable. To suppose that the author of the settlement intended to annex the seisin to the power, *to the exercise of which it is not in any way essential*, seems to be in the highest degree absurd. The direction to convey the "estate" must mean the estate to preserve contingent remainders. Indeed, the insolidity of the

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said [*trustees of a term*], their executors, administrators, and assigns for the term of 500 years, without impeachment of waste, upon such trusts as are thereinafter declared, for raising the sum of 10,000*l.* for the portions of the daughters and younger sons of the said [*tenant for life*], by the said Mary, Lady P——, his wife; with remainder *To the use* of the first and other sons of the said [*tenant for life*] on the body of the said Mary, Lady P——, his wife, lawfully to be begotten, successively in tail male; with remainder *To the use* of the said [*tenant for life*], his heirs and assigns for ever; In which indenture of release is contained a power enabling the said [*vendors*] and the survivor of them, and the heirs of such survivor, at any time during the life of the said [*tenant for life*], at the request and by the direction of the said [*tenant for life*], (to be signified by any writing or writings under his hand and seal, and to be attested by two or more credible witnesses (*c*)), to make sale and dispose of all or any

Recital of power of sale.

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objection is sufficiently apparent from the fact, that it is excluded by simply vesting the seisin and the power in different persons; for the accidental union of these characters in the same individuals surely ought not to raise an inference that the donor of the power intended, by the ambiguous expressions in question, to annex them in indissoluble companionship, when they are so completely independent in their nature as to be vested, without the slightest inconvenience, in different persons.

If, for the reasons suggested in the preceding observations, the powers of sale and exchange, and of appointing new trustees, are given to persons who are neither the releasees to uses, nor the trustees to preserve contingent remainders, every *semblance* of reason for taking a lease and release from them is removed, and a purchaser's conveyance would consist merely of an appointment by the donees under their power; unless, for the sake of caution, a lease and release were taken from the tenant for life, and which would then be confined to him alone. A deed changing the trustees of a settlement or will, who have powers only and no estate, of course does not disturb any of the existing uses, and has no operation as a conveyance, but consists simply of a nomination of the new donees of the powers in question. In framing the power of making such nomination, the direction to convey should be wholly omitted.

Whether an indefinite power of sale is valid.

(*c*) The power of sale contained in this settlement has been modified, in order to prevent its validity being involved in the question, formerly much agitated among conveyancers, whether a power of sale, the terms of which admit of its being exercised at any time, is or is not invalid, as contravening the well-known rule which forbids the suspension of the absolute vesting of, or of the dominion over, property for a longer period than a life in being, and a minority, or twenty-one years, after-

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part or parts of the —— and hereditaments thereinbefore mentioned to be granted and released, or any part thereof respectively, with their appurtenances, to any person or persons whomsoever, for such price or prices in money as to them the said [*vendors*], or the survivor of them, or his heirs, should seem reasonable; and, upon payment of the money arising by sale of the said premises, or any part thereof, to sign and give receipts for the same, which receipts should be sufficient discharges to any purchaser or purchasers; and

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wards. As the Editor has entered rather largely into the consideration of these questions elsewhere, (see 1 Jarm. Pow. Dev. 248, 388; 1 Jarm. on Wills, 250), and will have a more fitting occasion for discussing them in a future note of the present work, he will here content himself with observing, that, notwithstanding the decisions (noticed in the sequel) in favour of the validity of an unrestricted power of sale, the cautious practitioner may still deem it prudent to confine the power to the period of an existing life or lives, and a further period of twenty-one years. (*Cadell* v. *Palmer*, 7 Bligh, 202; 1 Jarm. on Wills, 221). This is often done, and probably in general without any view to the point under consideration, by requiring the consent of the tenant for life to the execution of the power, which, by rendering it exerciseable during his life only, necessarily keeps it within due limits. If the parties are anxious to give the power the utmost scope consistent with its unquestionable validity, other lives may be added to that of the tenant for life, as the rule admits of *any* number of existing lives. Thus, the lands might be made saleable by the trustees, or their representatives, in the usual manner, with the consent of the tenant for life, and, after his decease, by the trustees themselves, or the survivor, but not by the representatives of the surviving trustee, in their or his own discretion. This would give to the power an extended duration for the period which any of the trustees might happen to survive the tenant for life; but, in general, such an extent would not be required, since it is not usual to confide powers of this kind, which are not essential to the provident *management* of the estate, to the uncontrolled discretion of trustees.

It may be observed, that the most eminent conveyancers of the last century seem to have been apprehensive that general powers of sale could not be supported; as it is very common, in settlements prepared by them, to find the power restricted to the period of twenty-one years after the death of the tenant for life.

The decisions before adverted to, as affirming the validity of indefinite powers of sale in marriage settlements containing limitations in strict settlement, are—*Biddle* v. *Perkins*, 4 Simons, 135, decided by Sir *L. Shadwell*, V. C.; *Powis* v. *Capron*, Id. 138, n.; *Waring* v. *Coventry*, Id. 140, see 1 Myl. & K. 249; [*Boyce* v. *Hanning*, 2 Cr. & J. 334; *Wallis* v. *Freestone*, 10 Sim. 225; *Wood* v. *White*, 2 Keen, 664; 4 Myl. & Cr. 460: *Cole* v. *Sewell*, 2 Con. & Laws. 344; *Doe* d. *Davies* v. *Davies*, 1 Q. B. Rep. 330; see 1 Hayes's Conv. 498.]

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that such purchaser or purchasers should not be answerable for the application of the purchase-money therein acknowledged to be received; and when any of the premises should be so sold, it was declared that it should be lawful for the said [*vendors*], or the survivor of them, or his heirs by any deed or deeds, or writing or writings, to be sealed and delivered &c., to revoke and make void all and singular the uses, estates, trusts, declarations, and agreements limited and declared concerning the same in and by the indenture now in recital; and, by the same or any other deed or deeds, writing or writings, to be sealed and delivered and attested in the manner aforesaid to limit and appoint, convey and assure the same hereditaments unto the purchaser or purchasers thereof, or unto such other person or persons, to such use or uses, and in such manner, as he, she, or they should direct (*d*); freed and absolutely discharged of and from all and every the uses, estates, trusts, declarations, and agreements limited and declared by the indenture now in recital, but subject to such lease or leases as should have been made in pursuance of the power thereinbefore for that purpose contained. AND WHEREAS the said [*vendors*], (at the request and by the direction of the said [*tenant for life*] (*e*), testified

Recital of contract for sale.

(*d*) These words cannot be too general; the power should not be confined, as it sometimes is, to authorizing the trustees to convey to the use of the purchaser, which raises a question whether the ordinary uses to prevent dower can be limited.

Tenant for life should concur in the sale, and not merely in the conveyance.

(*e*) The power does not require the conveyance merely, but the *sale* to be made by the direction of the tenant for life, to be testified in the manner prescribed. In strictness, therefore, this direction ought to have been obtained previously to making the sale; for it has frequently been decided, that the subsequent approbation of an act is not sufficient, where previous consent is requisite; (see *Clarke* v. *Smith*, 19 Ves. 21; [*Thomas* v. *Dering*, 1 Keen, 729; *Graham* v. *Oliver*, 3 Beav. 124; *Adams* v. *Broke*, 1 You. & C. C. C. 627; *Salisbury* v. *Hatcher*, 2 Id. 54; *Blackwood* v. *Burrowes*, 2 Con. & L. 159]); the object of such requisitions being to obtain the benefit of the unbiassed exercise of the judgment and discretion of the party whose concurrence is required, and which object of course is defeated, if he is not consulted upon or informed of the act until it is done.

It is usual, however, in practice, to be satisfied with the concurrence of the tenant for life in the conveyance, without requiring evidence of his assent to the sale. In fact, the sale is generally made by the tenant for life himself; the trustees, though appearing on the face of the conveyance to be the principal actors, really do little more than execute the deeds, and receive the money in performance of *his* contract. Any

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by this writing under his hand and seal, and attested by the two credible persons whose names are intended to be hereupon indorsed as witnesses to the signing, sealing, and delivery of these presents by the said [*tenant for life*], have contracted and agreed with the said [*purchaser*] for the absolute sale to him of the —— and hereditaments hereinafter described and hereby intended to be assured, and the inheritance thereof in fee-simple in possession, free from all incumbrances, at or for the price or sum of 1000*l.*: AND WHEREAS the said [*tenant for life*] has consented to enter into the covenants on his part hereinafter contained. NOW THIS INDENTURE WITNESSETH (*f*), that, in pursuance of the said contract, and for the consideration hereinafter expressed, the said [*vendors*], at the request, and by the direction of the said [*tenant for life*], (testified as aforesaid), pursuant to and by virtue of the power or authority in the said [*vendors*] for this purpose vested by the hereinbefore-recited indenture of release and settlement, and of every other power or authority in anywise enabling them in this

Testatum.

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court would certainly be very unwilling to entertain an objection founded on the want of the previous consent of the tenant for life, testified in the manner required, he having joined in the conveyance, and probably would answer it by saying, that, as the contract for sale was invalid for want of the required consent, the conveyance itself, in which the tenant for life *has* concurred, is to be regarded as the really operative and binding contract; and therefore the requisition of the power is satisfied. The recital of course will treat the tenant for life as concurring in the sale, and not in the conveyance merely.

Power of sale, how to be framed.

(*f*) The exercise of a power of sale, it is obvious, includes both the revocation of the subsisting uses of the settlement, and the limitation of the new uses in favour of a purchaser; and therefore it is correct to accompany such a power with an express clause of revocation; but it is not essential, for if the settlement simply authorized the donees to sell and convey, it would be sufficient. *Bishop of Oxford* v. *Leighton*, 2 Vern. 367. The express power to revoke, indeed, is often omitted, being in effect comprised in the power to appoint, since every new limitation of uses necessarily involves the revocation of the old or subsisting uses for which they are to be substituted. The purchaser's conveyance will assume the form either of a deed of revocation and new appointment, or of a deed of new appointment alone, as the power is framed in one way or the other. If the power does not require an express revocation of the uses of the settlement, the testatum clause in the precedent in the text which contains the revocation should be omitted; and this may be the more conveniently done, because the receipt of the purchase-money is acknowledged in the subsequent testatum clause.

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behalf, *Do*, by this present deed or writing, by them sealed and delivered in the presence of and attested by the two credible persons whose names are intended to be hereupon indorsed as witnesses to the sealing and delivery thereof by the said [*vendors*], absolutely revoke, determine, and make void All and every the uses, trusts, powers, and provisoes in and by the hereinbefore-recited indenture of release and settlement limited concerning the said —— and hereditaments hereinafter described and intended to be hereby assured, so far as the same uses, trusts, powers, and provisoes, or any of them, relate to or affect the said —— and hereditaments, or any part thereof, [or all such of the same uses, trusts, powers, and provisoes as are not necessary to effectuate and complete the hereinbefore-recited contract of sale and the appointment intended to be hereby made, or which do not operate in confirmation of these presents and the uses hereby declared]. AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said contract, and in consideration of the said sum of 1000*l.* of lawful British money paid by the said [*purchaser*] to the said [*vendors*] at or immediately before the execution of these presents, at the request and by the direction of the said [*tenant for life*], testified as aforesaid, to be disposed of by them the said [*vendors*], according to the trusts of the hereinbefore-recited indenture, the receipt and payment of which sum the said [*vendors*] do hereby acknowledge, and from the same do, and the said [*tenant for life*] also doth, absolutely release and discharge the said [*purchaser*], his appointees, heirs, executors, administrators, and assigns; The said [*vendors*], pursuant to and by virtue of the power or authority in the said [*vendors*] for this purpose vested by the hereinbefore-recited indenture of release and settlement, and of every other power or authority in anywise enabling them in this behalf, at the request and by the direction of the said [*tenant for life*], testified as aforesaid, *Do* by this deed or writing so by them sealed and delivered, and intended to be attested as hereinbefore is mentioned, limit, direct, and appoint that the —— and hereditaments hereinafter described and intended to be hereby assured, with the appurtenances, shall from henceforth remain and be to the uses, upon the trusts, and for the intents and purposes hereinafter expressed concerning the same (*g*).

Vendors, by the direction of tenant for life, in consideration of purchase-money, appoint to the uses after expressed.

(*g*) The conveying part of the deed might properly terminate here

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AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said contract, and for the consideration hereinbefore expressed, and also in consideration of the sum of 10*s.* of lawful money as aforesaid paid by the said [*purchaser*] to the said [*vendors*] and [*tenant for life*], at or before the execution of these presents, the receipt whereof is hereby acknowledged, they the said [*vendors*], at the request and by the direction of the said [*tenant for life*], testified as aforesaid, and according to their estate, right, and interest, *Do* and each of them *Doth*, by these presents, (made in pursuance of an act passed in the fourth year of the reign of Queen Victoria, intituled "An Act for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties"), bargain, sell, release, and convey; And the said [*tenant for life*] *Doth* by these presents grant, bargain, sell, release, and confirm unto the said [*purchaser*] and his heirs, ALL (*parcels and general words, ut ante, p.* 73); And the reversion and reversions, remainder and remainders, yearly and other rents and profits of all and singular the said hereditaments; *And also* all the estate, right, title, interest, use, trust, inheritance, benefit, property, claim, and demand of them the said [*vendors*] and [*tenant for life*] respectively in and to the —— and hereditaments hereinbefore described and expressed to be hereby assured, with their appurtenances; And all deeds, &c. (*ut ante, p.* 73); TO HAVE AND TO HOLD the said —— and hereditaments, and all and singular other the premises hereinbefore described and expressed to be hereby assured, with their appurtenances, unto the said [*purchaser*] and his heirs for ever; (*to uses to prevent dower, ut ante, p.* 73; *Covenant by vendors that they have not incumbered, ut infra, p.* 249). AND the said [*tenant for life*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*purchaser*] and his heirs in manner following, (that is to say), That, notwithstanding any act, deed, matter, or thing whatsoever made, done, committed, or knowingly suffered by the said [*tenant for life*], or

Further testatum.

Vendors and tenant for life release to the purchaser.

Parcels.

Reversion.

Estate.

Habendum.

Covenants by tenant for life,

—that the vendors have power to convey;

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for the reasons stated in a former note. (Vide ante, p. 234). If the subsequent part of the precedent be not wanted, it will simply be necessary for the person using the precedent to omit the next testatum clause, taking care to insert the description of the parcels in the appointment, instead of referring to the release for it.

Subsequent part of the precedent might be dispensed with.

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any of his ancestors (*h*), or any person or persons lawfully claiming through or under them or any of them, to the contrary, they the said [*vendors*] and [*tenant for life*], or some or one of them, now have or hath full power and lawful and absolute authority by these presents to limit and appoint, convey and assure, the —— and hereditaments hereinbefore described and expressed to be hereby assured, with their appurtenances, *To the uses* and in manner aforesaid, according to the true intent and meaning of these presents; *And further*, that the said —— and hereditaments, shall and may from time to time and at all times for ever hereafter remain and be to the uses hereinbefore declared concerning the same, and shall and may be peaceably and quietly held and enjoyed, and the rents and profits thereof received and taken accordingly, without interruption, disturbance, or denial from or by the said [*tenant for life*] (*i*), or any person or persons lawfully claiming by, from, through, under, or in trust for him or any of his ancestors; *And that* free and clear of and from, and freely, clearly, and absolutely exonerated and discharged, or otherwise by him the said [*tenant for life*], his heirs, executors, and administrators, effectually kept harmless and indemnified from and against all and all manner of former and other estates, rights, titles, charges, and incumbrances whatsoever, had, made, done, committed, or suffered by the said [*tenant for life*] (*k*), or any of his ancestors; *And moreover*, that he the said [*tenant for life*] (*l*),

—for quiet enjoyment;

—free from incumbrances;

—for further assurance;

Variation where the estate has come from the wife, or her ancestor.

(*h*) Where the settled estate belonged, before the marriage, to the covenantor's wife, having descended to her from an ancestor, (which ought to be made to appear by the recital of the settlement), instead of "or any of his ancestors," say—

"or by the said [*wife*], his wife, or any of her ancestors."

(*i*) *Or*, as the case may be—

"or the said [*wife*], his wife, or any person or persons lawfully claiming by, from, through, under, or in trust for him or her, or any of her ancestors."

(*k*) *Or*, as the case may be—

"or the said [*wife*], his wife, or any of her ancestors."

(*l*) *Or*, "and [*wife*], his wife, and her heirs, and every other person lawfully claiming any estate, &c. by, from, through, under, or in trust for her the said [*wife*], or any of her ancestors."

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and his heirs, and every other person lawfully claiming any estate, right, title, trust, or interest in, to, or out of the —— and hereditaments hereinbefore expressed to be hereby assured, by, from, through, under, or in trust for (*m*) any of the ancestors of him the said [*tenant for life*], will and shall from time to time and at all times hereafter, upon every reasonable request, and at the proper costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, and execute, or cause to be made, done, and executed, *All* such further acts, deeds, conveyances, and assurances in the law whatsoever for the more effectually appointing, granting, or assuring the —— and hereditaments hereinbefore described and expressed to be hereby assured, with the appurtenances, unto the said [*purchaser*] and his heirs, to the uses aforesaid, or otherwise, as by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel in the law, shall be reasonably advised and required, [so that &c. (*ut ante, p.* 77)]. *And also*, that he the said [*tenant for life*], his heirs, executors, administrators, or assigns, will or shall from time to time and at all times hereafter, (unless prevented by fire or other inevitable accident), on every reasonable request, and at the proper costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, or any of them, produce at any place or places within the United Kingdom, to the said [*purchaser*], his appointees, heirs, or assigns, or to such person or persons as he or they shall direct, or at any trial, hearing, or examination in any court of law or equity, or other judicature, or upon the execution of any commission, as occasion shall require, for the manifestation and defence of the title of the said [*purchaser*], his appointees, heirs, or assigns, to the hereditaments hereby intended to be assured, the hereinbefore-recited indentures of lease and release and settlement of the —— and —— days of ——; And will or shall, on the like request, and at the like costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, deliver to him or them copies, to be attested if required, or abstracts

— to produce settlement,

and deliver copies.

(*m*) *Or*, "and [*wife*], his wife, and her heirs, and every other person lawfully claiming any estate, &c. by, from, through, under, or in trust for her the said [*wife*], or any of her ancestors."

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of the said indentures, or either of them, or any part thereof respectively, and permit the said [*purchaser*], his appointees, heirs, or assigns, or his or their attorney, or solicitor, or other nominee, to compare such copies or abstracts with the same indentures respectively. IN WITNESS &c.

35. IN FEE BY DEVISEES IN TRUST FOR SALE.

35. RELEASE *in* FEE *by* DEVISEES *in* TRUST *for* SALE, (*one of whom is Heir*). COVENANTS *for* TITLE *by the* HEIR, *who is* BENEFICIALLY INTERESTED *in the* PURCHASE-MONEY (*a*). VARIATION *where the* HEIR-AT-LAW, NOT *a* TRUSTEE, *concurs*. *Also where the Consent of a third Person is required to the Sale. Also, where the* TESTATOR *has subsequently* CONTRACTED *for the* SALE *of the Property.*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [A.], of &c., [B.], of &c., and [C.], of &c., devisees

As to obtaining the concurrence of the testator's heir.

(*a*) Where the vendor of freehold estate claims under a recent will, either beneficially or as trustee, it is always desirable for the purchaser to have the concurrence of the testator's heir, lest the will should happen to have been invalidated by circumstances not appearing upon the face of it, as the mental incapacity of the testator, his not having been present at the time of the subscription of the attesting witnesses, &c. A will, apparently the most correct in all its parts, may completely fail of operation from defects of this kind; for, however reprehensible is the conduct of witnesses who attest a will without satisfying themselves of the testator's sanity, and that the statutory regulations have been complied with, yet their subscription of the memorandum of attestation does not preclude the heir from shewing by their own testimony, that the will was not duly executed. The respectability of the witnesses is a purchaser's chief security against the danger in question; therefore, if they are not persons of character, and the will is of recent date, the motive for requiring the concurrence of the heir acquires additional force. Where the heir takes a beneficial interest in the purchase-money, as in the present case, there is, of course, less difficulty in inducing his concurrence than where he is wholly excluded from all benefit; though the value of such concurrence is diminished in precisely the same proportion, on account of the greater improbability of the heir ever calling in question the validity of the will. But though it is usual to consider the heir as possessing the alternative title, in the event of the failure of the devise, yet it is to be observed that this is not necessarily the case, for

Heir not necessarily let in by the vacating of a will.

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in trust named in the last will and testament of [*testatrix*], late of ——, deceased, (the said [C.] being also the eldest son and heir-at-law of the said [*testatrix*]), of the first part (*b*); [*purchaser*], of &c., of the second part; and [*purchaser's trustee*], of &c., of the third part: WHEREAS the said [*testatrix*], being seised by purchase and not by descent (*c*) to her and her heirs in fee-simple of the close and hereditaments hereinafter described and hereby released, or intended so to be, by her last will and testament in writing, bearing date on or about the —— day of ——, duly executed and attested for the devise of freehold estates (*d*), gave and

Recital of will:

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there may happen to be in existence an anterior will, which would be called into operation by the vacating of the subsequent devise; and here the reader can scarcely fail to be reminded (supposing him to have heard) of the often-told story of the heir, who, finding a will of his ancestor, recently deceased, which partially excluded him, destroyed it, and then communicated to a friend of the deceased the intelligence of his ancestor's intestacy; when, to his astonishment and dismay, the latter intimated that he had in his possession a will, long since executed by his deceased friend, which, when produced, was found to exclude the heir *entirely*, and was therefore much more disadvantageous to him than the *later* will which he had destroyed, and by which, but for his own act, the discovered will would have been superseded.

A person using the precedent in the text, in a case in which trustees sell simply, without the concurrence of any beneficial owner, has only to omit those parts of the precedent which relate to such owner.

(*b*) The heir, if he is not previously a party in another character, or any other person joining to testify his concurrence in the sale, will be the party of the second part.

As to recitals of title.

(*c*) [It is usually desirable, in reciting the title of the conveying party, not only to shew what estate is in him, but also, by referring to some previous instrument in which may be found a recital carrying the title back another step, and pointing out the sources of still further information, to provide on the documents of title themselves a connected chain of recitals, or history of the title. The will in this case may be supposed to have contained (as carefully-drawn wills frequently do contain) a recital of the conveyance to the testatrix. If this were not so, it would be proper to supply the deficiency by a recital of such conveyance by way of introduction to the recital of the devise. Where a title by descent is relied on, it is doubly important to state the origin and nature of the title of the deceased owner or ancestor. (Vide ante, p. 162, n. (*c*)). It should be observed, however, that some practitioners are less favourably disposed to the introduction of recitals of the prior title, especially where it is traced through documents.]

As to recital of a devise.

(*d*) [If the will was executed subsequently to the year 1837, any allusion to the mode of execution would be superfluous, as no writing executed in this country since that time is a will for any purpose,

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devised unto the said [*vendors*], their heirs and assigns, *All* her real estate of what nature and kind soever, upon the trusts thereinafter expressed concerning the same, (that is to say); *Upon trust* that they the said [*vendors*], or the survivors or survivor of them, or the heirs of such survivor, should, as soon as conveniently might be after her decease (*e*), sell and absolutely dispose of all the real estate of her the said [*testatrix*], either together or in parcels or lots, at public auction or by private contract, for such price or prices in money as they her said trustees, or the survivors or survivor of them, or his heirs, could obtain for the same, and should apply and dispose of the money arising from such sale or sales in the manner therein expressed; And the said [*testatrix*] declared that the receipt and receipts of her said trustees, or the survivors or survivor of them, or his heirs, for any monies paid to them or him in the execution of the said trust, should effectually discharge the person or persons paying the same from all responsibility in respect of the application thereof (*f*). AND WHEREAS the said [*testatrix*] departed

—of death of

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unless it is a will for all purposes. The same observation, indeed, applies, though somewhat less obviously, to the reference to the execution of a will under the old law, since the mere recital that the testator by his will devised the freehold estates in question, necessarily implies that the will was duly executed and attested for the purpose.]

(*e*) "with the consent of the said [*consenting party*], to be testified by some writing under his hand."

Effect of contract for sale after the date of the will.

(*f*) If, subsequently to the execution of the will, the testatrix contracted for the sale of the property, such contract would operate as a revocation of the devise in equity, leaving it in full force in regard to the legal estate. The consequence is, that the purchase-money would be payable not to the devisees in trust, but to the executor, as part of the personal estate of the testatrix; (*Eaton* v. *Sanxter*, 6 Sim. 517; *Farrar* v. *E. of Winterton*, 5 Beav. 1; *Moor* v. *Raisbeck*, 12 Sim. 123); and the devisees in trust, by the direction of the executor, convey the estate. In such case, the following recital should be substituted for the recitals in the text describing the contract by the trustees:—

"AND WHEREAS the said [*testatrix*], subsequently to the execution of her said will, namely, on the —— day of ——, entered into a contract in writing with the said [*purchaser*] for the absolute sale to him of the —— hereditaments hereinafter described and hereby released or intended so to be, for an estate of inheritance in fee-simple in possession, free from all incumbrances, at or for the price or sum of £——, but no conveyance was executed by the said [*testa-*

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this life shortly after the date of her hereinbefore-recited will, without having revoked or in anywise altered the same; which will, on or about the —— day of ——, in the year ——, was duly proved by [T. L.], one of the executors therein named, in the Prerogative Court of the Archbishop of Canterbury. AND WHEREAS the said [*heir-at-law*] is the heir-at-law of the said [*testatrix*], being her eldest son by [A. B.], her late husband, deceased, with whom she intermarried at ——, in or about the month of ——, 18—, and the said [*heir*] was christened at ——, on or about the —— day of ——. AND WHEREAS a public auction was held at the Auction Mart, in Bartholomew Lane, London, on the —— day of —— last, by the order and on the behalf of the said [*vendors*], the trustees named in the hereinbefore-recited will of the said [*testatrix*] (*g*), for selling, together with other parts of the real estate of the said [*testatrix*], deceased, the close and hereditaments hereby released, or intended so to be, with the appurtenances, and the inheritance thereof in fee-simple, free from all incumbrances, except as hereinafter is excepted; and the said [*purchaser*] attended the said auction, and offered the sum of £—— for the said close and hereditaments, and, being the best bidder for, was declared the purchaser of, the same, at that price (*h*): [AND WHEREAS

testatrix, and probate of will;

—the eldest son the heir;

—of sale by auction.

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trix] to the said [*purchaser*] in pursuance and execution of the said contract."

(*g*) "with the consent of the said [*consenting party*], testified by his signing and sealing these presents."

As to the recital of the mode of sale.

(*h*) Where a power or trust for sale authorizes a sale by public auction only, or private contract only, the recitals of the deed of conveyance should shew which mode of sale was pursued; and, where the subject of the conveyance is a reversion, it is proper to state the sale to have been by auction, if such is the fact, since a sale by auction of a reversionary interest is less liable to be impeached than a sale by private contract. (Vide ante, Vol. 3, p. 452). In such cases it seems desirable to specify the time and place of sale, &c.; but, where the mode of sale is immaterial, the recital cannot be framed in terms too general; and to enter into a minute detail of the particulars respecting the sale seems quite superfluous. The recital in the text might be more shortly expressed thus:—

Shorter recital of sale by auction.

"AND WHEREAS the said [*vendors*], in the execution of their aforesaid trust, lately offered for sale by public auction the hereditaments hereinafter described and hereby released, and the inheritance in fee-simple thereof, free from all incum-

35. IN FEE BY DEVISEES IN TRUST FOR SALE.

the said [*purchaser*] hath requested that the said close and hereditaments so purchased by him as aforesaid may be conveyed to the uses, upon the trusts, and for the intents and purposes hereinafter expressed concerning the same (*i*):] AND WHEREAS the said [*heir*], being beneficially interested in the monies to arise from the sale of the real estate of the said [*testatrix*] by virtue of the trusts of her hereinbefore-recited will, hath agreed to enter into the covenants for title, for quiet enjoyment, for freedom from incumbrances, and for further assurance hereinafter contained (*k*). NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £—— of lawful British money, paid by the said [*purchaser*] to the said [*vendors*] (*l*) immediately before the execution of these presents, in full for the absolute purchase of the close and hereditaments hereby released, or intended so to be, for an estate in fee-simple, the receipt of which sum the said [*vendors*] do hereby acknowledge, and from the same do release and discharge the said [*purchaser*], his appointees, heirs, executors, administrators, and assigns, they, the said [*vendors*], according to their estate and interest, *and as to the said* [*A.*] *and* [*B.*] (*m*), by way of assurance only, and not by way of covenant or warranty (*n*), *Do*,

Testatum.

In consideration of purchase-money, trustees convey to purchaser.

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brances, except as hereinafter mentioned; and at such auction the said [*purchaser*] became the highest bidder for, and was declared the purchaser of, the same, at the sum of £——."

(*i*) This recital is superfluous, and is now usually omitted.

(*k*) Unless the heir takes a beneficial interest in the proceeds of the sale, it is not to be expected that he should covenant for the title.

Variations.

(*l*) If the sale was made by the testatrix, instead of the words—"to the said [*vendors*]," say—"to the said [*executor*];"

and, of course, in the acknowledgment of the receipt for the money, the verb should be adapted to the singular number.

(*m*) If the heir is not one of the trustees, of course the words in italics must be omitted.

(*n*) If the sale is with the consent of a third person, say—

"with the consent and approbation of the said [*consenting party*], testified by his signing and sealing these presents."

If the sale was made by the testatrix, the addition will be as follows:—

"At the request and by the direction of the said [*executor*]".

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by these presents, (made &c., *ut ante, p.* 72), bargain, sell, and release (*o*) unto the said [*purchaser*] and his heirs for ever, ALL THAT &c. (*describe parcels*); And all hedges, ditches, fences, pales, rails, waters, watercourses, profits, commodities, advantages, emoluments, and appurtenances whatsoever to the said close or parcel of land, hereditaments, and premises belonging or in anywise appertaining; *And* the reversion and reversions, remainder and remainders, yearly and other rents, and profits of the close and hereditaments hereby released, or intended so to be, and in particular the yearly rent of 10*l.* 10*s.*, being an apportioned (*p*) part of the rent reserved by the lease hereinafter excepted, which is to be paid for or in respect of the said close and hereditaments during the continuance of such lease; *And* all the estate, right, title, interest, use, trust, inheritance, property, possession, benefit, claim, and demand whatsoever, at law and in equity, of them the said [*vendors*] (*q*) respectively, in, to, of, and upon the close and hereditaments hereby released, or intended so to be. TO HAVE AND TO HOLD the close and hereditaments hereinbefore described, and all and singular other the premises hereby released, or intended so to be, with their appurtenances, unto the said [*purchaser*] and his heirs for ever, TO THE USES, upon the trusts, and for the intents and purposes hereinafter expressed concerning the same, (that is to say); (*uses to prevent dower, and declaration excluding dower, ut ante, p.* 73). AND each of them the said [*vendors*] (*r*), severally and apart from the others of them, and as to and concerning his own acts and defaults only, doth hereby, for himself, his heirs, executors, and administrators, covenant with the said [*purchaser*] and his heirs in manner following, (that is to say); that they the said [*vendors*] (*q*) respectively have not, nor have or hath any of them, made,

Parcels.

General words.

Reversion, &c.; particularly part of an apportioned rent.

All the estate.

Habendum.

Covenant by vendors that they have not incumbered.

(*o*) If the heir, not being one of the trustees, joins, add—
"and the said [*heir*] *Doth*, by these presents, grant, bargain, sell, release, and confirm," &c.

(*p*) This apportionment, in order to be effectual, must have been made with the concurrence of the lessee; for a lessor is not at liberty arbitrarily to apportion the rent, and thereby render the lessee liable to several distresses and actions which may be distributed unequally among the respective portions; but the lessee is entitled to have the apportionment fixed by a jury. Vide ante, Vol. 4, p. 334; *Roberts* v. *Snell*, 1 Man. & Gr. 577.

As to apportionment.

(*q*) "and [*heir*]."

(*r*) The heir's two co-trustees joined in this covenant.

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done, executed, or knowingly suffered any act, deed, matter, or thing whatsoever, by means whereof the close and hereditaments hereby released, or intended so to be, or any part thereof, are or is charged, incumbered, or in any manner affected in title, charge, estate, or otherwise howsoever. AND

Covenants by heir-at-law,

the said [*heir-at-law*] (*s*) doth hereby, for himself, his heirs, executors, and administrators, covenant with the said [*purchaser*] and his heirs in manner following, (that is to say);

that, notwithstanding, &c., the grantors stand seised,

That, notwithstanding any act, deed, matter, or thing whatsoever made, done, or permitted to the contrary by him the said [*heir*], or by the said [*testatrix*], deceased, or any person or persons rightfully claiming by, from, through, under, or in trust for them or either of them, (except as appears by these presents), they the said [*vendors*], or some of them, are now seised to them and their heirs, or one of them is now seised to him and his heirs, of an absolute and indefeasible estate of inheritance in fee-simple of and in the close and hereditaments hereby released, or intended so to be;

and have power to convey;

And also, that, notwithstanding any such act, deed, matter, or thing as aforesaid, (except as aforesaid), they the said [*vendors*], or some of them, now have in themselves respectively, or one of them hath in himself, full power and lawful and absolute authority, by these presents, to convey and assure the close and hereditaments hereby released, or intended so to be, to the uses, upon the trusts, and for the intents and purposes hereinbefore expressed concerning the same, according to the true intent and meaning of these presents; *And also*, that the close and hereditaments hereby

—that premises shall remain to the uses aforesaid,

released, or intended so to be, shall, henceforth and at all times hereafter, remain, continue, and be to the uses, upon the trusts, and for the intents and purposes hereinbefore expressed concerning the same; And the same close and hereditaments shall and may be peaceably and quietly held and

without interruption by covenantor, &c.,

enjoyed, and the rents and profits thereof received and taken accordingly, without any interruption or denial whatsoever of, from, or by the said [*heir*] or his heirs, or any other person or persons whomsoever rightfully claiming any estate, right, title, or interest, at law or in equity, of, in, or to the same close and hereditaments, by, from, through, under,

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As to covenants by heir.

(*s*) Where the heir, taking no beneficial interest under the will, joins merely for the purpose of confirming the title, of course he cannot be expected to enter into covenants for title. Here he enters into those covenants on account of his being interested in the purchase-money.

35. IN FEE BY DEVISEES IN TRUST FOR SALE.

or in trust for him the said [*heir*], or by, from, through, under, or in trust for the said [*testatrix*], deceased, (other than and except the person whose estate or interest is hereinafter excepted); *And that* free and clear, and absolutely exonerated and discharged, or otherwise by him the said [*heir*], his heirs, executors, or administrators, at his or their own costs, effectually saved harmless and kept indemnified, of, from, and against all and all manner of former and other estates, rights, titles, charges, and incumbrances which at any time or times heretofore may have been made, occasioned, or suffered by the said [*heir*] and [*testatrix*], deceased, or either of them, or any person or persons rightfully claiming by, from, through, under, or in trust for them or either of them, or by or with the acts, means, consent, defaults, privity, or procurement of him, her, them, or any of them, (other than and except a certain indenture of lease, bearing date on or about the —— day of ——, by which the said [*testatrix*], deceased, demised the close and hereditaments hereby released, with other hereditaments, to [*lessee*], of &c., his executors, administrators, and assigns, for a term of —— years from ——, 18—, at the yearly rent of £——); *And moreover*, that he the said [*heir*], and his heirs, and all persons whosoever rightfully claiming any estate, right, title, trust, charge, or interest, at law or in equity, of, in, to, out of, or upon the close and hereditaments hereby released, by, from, through, under, or in trust for him or them, or by, from, through, under, or in trust for the said [*testatrix*], deceased, (other than and except the person whose estate or interest is hereinbefore excepted), will and shall, from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, execute, and perfect all such further acts, deeds, conveyances, and assurances in the law whatsoever, for the more effectually releasing, confirming, or otherwise assuring the close and hereditaments hereby released, or intended so to be, to the uses, upon the trusts, and for the intents and purposes hereinbefore expressed of the same, or as near thereto as circumstances will then admit, and according to the true intent and meaning of these presents, as by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel in the law, shall be advised and required; [so as &c., *ut ante*, *p.* 77]. IN WITNESS &c.

free from incumbrances,

(except a lease granted by testatrix);

and for further assurance.

36. BY TRUSTEES, WHERE PART OF PURCHASE-MONEY REMAINS ON MORTGAGE.

36. RELEASE *in Fee by* TRUSTEES *for* SALE *of the Moiety of a Manor, with the* CONSENT *of the* CESTUIS QUE TRUST, *to a* PURCHASER, *where part of the* PURCHASE-MONEY *remains on Mortgage, secured by a* TERM *of* YEARS *limited to the* VENDORS (*a*). COVENANTS *for* TITLE *by the* CESTUIS QUE TRUST, *who are numerous. Variation where Vendors' Mortgage is in Fee.*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendors*], of &c., of the first part; [*six persons benefi-*

As to mortgages to vendors to secure unpaid purchase-money.

(*a*) Where a vendor takes a mortgage to secure any unpaid portion of the purchase-money by the same deed which conveys the estate to the purchaser, it seems to have been the usual plan to limit to the vendor for this purpose a term of years, and to the purchaser the inheritance, (subject to the term), to the ordinary uses for preventing dower. The incorporation of the mortgage and purchase-deed in one conveyance, however, affords no reason why the mortgage to the vendor should not be in fee; and, as such mortgages have now, in a great measure, superseded mortgages for years, a variation adapting the precedent in the text to a mortgage in fee has been added. Where the vendor, being already seised in fee, takes a mortgage of the *inheritance*, no alteration is thereby made in the legal ownership, the equitable title alone being changed; which effect might have been produced by a mere declaration by the vendor that he holds the estate subject to redemption by the purchaser, on payment of the mortgage-money, and with or without (as may be intended) a power of sale in default of payment. The deed, however, is seldom prepared in this form; and an objection to it is, that the covenants for title would be necessarily covenants in gross; whereas, if a seisin is created, and uses are limited on that seisin, the covenants entered into by the vendor with the releasee will run with the land, (vide ante, p. 69), *i. e.* will follow the use; which ought in such case (in order to prevent the covenant from vesting in the covenantor himself) to be limited to a trustee for, and not to, the vendor; and then, when the purchaser pays off the mortgage, and takes a conveyance of the estate, he will have the benefit of those covenants. This observation, however, (unless the doctrine suggested in a future note can be sustained), only applies where the covenants for title are entered into by the person having the legal estate, and not to such a case as the present, in which they proceed from persons having no interest in the land, and whose covenants are commonly supposed to be covenants in gross. The advantage of incorporating the purchase-deed and mortgage in fee in the same conveyance, instead of first vesting the estate in the purchaser, and then, by a separate and subsequent deed, making him im-

cially interested], of &c., of the second part; [*purchaser*], of &c., of the third part; and [*purchaser's trustee*], of &c., of the fourth part: WHEREAS [*testator*], of &c., being, at the time of making his will hereinafter recited, and from thence

36. BY TRUSTEES, WHERE PART OF PURCHASE-MONEY REMAINS ON MORTGAGE.

Recitals.

mediately re-convey to the vendors, as mortgagees, is, that it prevents the possibility of the estate being subjected to any incumbrances affecting the purchaser. This danger, however, is of no great extent, on account of the rule in equity, which gives to the vendor an equitable lien on the estate for his unpaid purchase-money, (ante, Vol. 5, p. 14), and which would not be superseded by his taking a mortgage on the same estate. The lien in question prevails against all persons claiming under the purchaser, (including his assignees in bankruptcy, who are bound by equities affecting the bankrupt), except purchasers for valuable consideration without notice, against whom it would not prevail; but, as the execution of the mortgage, by which he parts with the estate, immediately follows the execution of the conveyance by which he derives it, the purchaser has no opportunity of creating such a title in a third person. The only material risk seems to arise from the possibility of the purchaser being a Crown specialty debtor; for, as the Crown is not bound by equities, it would take the land, discharged from the vendor's equitable lien; and this alone affords an adequate reason for preventing the estate from vesting for an instant in the purchaser. The claim of the Crown is, of course, effectually excluded by the limitations in the precedent in the text. Indeed, it has been decided, that, where a term of years is limited to the vendor by the purchaser's conveyance to secure his unpaid purchase-money, (as in this instance), the land is not affected by a specialty Crown debt of the purchaser, notwithstanding that a subsequent purchaser pays off the mortgage, and procures an assignment of the term to attend the inheritance; for, though attendant terms do not protect against such debts, yet here the term, never having been attendant in trust for the debtor, is, to all intents and purposes, *as to him*, a term in gross. Ante, Vol. 5, p. 71.

As to mortgages to third persons advancing part of the purchase-money.

Sometimes part of the purchase-money is advanced by a third person, who takes a mortgage on the estate. Very little variation would be requisite in order to adapt the precedent in the text to such a case. The estate will, of course, be granted to the purchaser to the use of the intended mortgagee for a term, as in the text, with limitations of the inheritance, subject to the term, to the usual uses to prevent dower, in favour of the purchaser; or, if the mortgage is to be in fee, then the grant will be unto and to the use of the mortgagee in fee, subject to redemption on payment by the purchaser, his heirs, &c., of the mortgage debt. The reason for taking the mortgage directly from the vendor, without allowing the estate to pass through the purchaser, is stronger in the case of a mortgage to a third person than in that of a mortgage to the vendor himself, because the former has no lien on the estate independently of his mortgage security, as we have seen a vendor has. The purchaser sometimes objects to the plan, because it discloses the mortgage to the vendor.

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Late owner's seisin and will.

to the time of his decease, seised of one moiety of the manor and other hereditaments hereinafter described, in fee-simple, duly made and published his last will and testament in writing (*b*), bearing date on or about the —— day of ——, (*recite will devising real estate to vendors in trust for sale, and bequeathing the monies arising from the sale to certain persons therein mentioned, and death of testator and probate of his will*). AND WHEREAS, according to and by the effect of events which have taken place since the death of the testator, the said parties hereto of the second part are the only persons beneficially interested in the monies to arise by the sale of the hereditaments and premises directed to be sold by the said will of the said [*testator*], and they the said parties are interested in the said monies in the proportions following, namely (*specify the proportions*) (*c*). AND WHEREAS the said [*vendors*], at the request of the said parties hereto of the second part, have contracted with the said [*purchaser*] for the absolute sale to him of the said undivided moiety of the manor and other hereditaments hereinafter described, for an estate of inheritance in fee-simple in possession, free from incumbrances at or for the price or sum of 1200*l.*; And, upon the treaty for such sale, it was agreed that the sum of 700*l.*, part of the said purchase-money of 1200*l.*, should be paid by the said [*purchaser*] upon or previously to the execution of these presents; And that the sum of 500*l.*, being the remaining part of such purchase-money, should remain at interest upon security of the same hereditaments by way of mortgage in manner hereinafter mentioned. AND WHEREAS the said parties hereto of the second part have agreed to enter into the covenants on their part hereinafter

Contract for sale, and agreement that part of the purchase-money shall remain on mortgage.

Recital of devise under new law.

(*b*) [If the will operated under the new law, say—

"WHEREAS [*testator*], of &c., by his last will, bearing date on or about the —— day of ——, devised all" &c.

Indeed, this recital would be sufficient in reference to the old law. (See observations, ante, pp. 139, 245, n.) When it is recited that the estates were devised, every circumstance necessary to the validity of such devise is impliedly stated also.]

(*c*) As the only purpose for which the parties beneficially entitled join is to covenant for the title, it seems to be unnecessary to specify the particular events by which they have become entitled. It is sufficient that the amount of their respective aliquot shares, to which their covenants are restricted, is apparent.

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contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 700*l.* of &c., part of the said purchase-money or sum of 1200*l.*, paid to the said [*vendors*], as trustees as aforesaid, by the said [*purchaser*], at or before the execution of these presents, at the request of the said parties hereto of the second part, testified by their severally executing these presents, (the receipt of which sum of 700*l.* the said [*vendors*] do hereby acknowledge, and from the same they, and also the said parties hereto of the second part, do, and every of them doth, acquit, release, and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, for ever, by these presents); *And also*, in consideration of the further sum of 500*l.*, the remainder of the said purchase-money or sum of 1200*l.*, secured to be paid with interest in manner hereinafter mentioned, they the said [*vendors*], at the request and by the direction of the said parties hereto of the second part, testified as aforesaid, *Do*, by these presents, (made in pursuance &c., *ut ante*, *p.* 72), bargain, sell, and release, And the said parties hereto of the second part *Do*, and every of them *Doth*, remise, release, and quit claim unto the said [*purchaser*] and to his heirs ALL that one full and undivided moiety or half part (the whole into two equal parts to be divided) of and in ALL THAT &c. (*describe manor, &c.*), and of and in all and singular houses, &c. (*vide ante*, *p.* 200), And all the estate, &c.; TO HAVE AND TO HOLD the undivided moiety or half part expressed to be hereby released of and in the manor and hereditaments hereinbefore described, with their and every of their rights, members, and appurtenances, unto the said [*purchaser*] and his heirs for ever; *Nevertheless*, TO THE USE of the said [*vendors*], their (*d*) executors, administrators, and assigns, from the day

Testatum.

In consideration of sum paid and sum secured by purchaser, vendors, at the request, &c. release.

Parcels.

Habendum.

(*d*) If the mortgage is to be in fee, with a power of sale, substitute for the ensuing paragraphs in the text down to the covenants :—

" heirs and assigns for ever, subject, nevertheless, to the proviso or agreement for redemption and re-conveyance hereinafter contained, (that is to say); (*proceed with the proviso for redemption on payment of mortgage-money, with power of sale in default of payment, ut ante, Vol.* 5, p. 564)."

Variation where mortgage is in fee, with a power of sale.

Where the mortgage taken by the vendors is in fee, and not for a term, it is unnecessary to limit the equity of redemption to uses to prevent dower; but it may be simply declared, as in the mortgage precedent

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next before the day of the date hereof, for and during and unto the full end and term of 2000 years thence next ensuing, and fully to be complete and ended, without impeachment of or for any manner of waste, subject to the proviso hereinafter contained for making void the same term; And from and after the expiration or other sooner determination of the said term of 2000 years, and in the meantime subject thereto, To SUCH USES, &c. (*uses to bar dower, ut ante, p.* 73, *Covenant by vendors that they have not incumbered, ut ante, p.* 249). AND the said parties hereto of the second part, for themselves severally and respectively, and for their respective heirs, executors, and administrators, (but each of them as for and concerning an aliquot part or share only in the hereditaments hereby expressed to be hereby released, equal to and corresponding with his part or share in the monies to arise from the sale thereof as aforesaid, and not for the parts or shares, acts, deeds, or defaults of the others of them respectively), do hereby severally covenant and agree with the said [*purchaser*] and his heirs, in manner following, (that is to say), that, notwithstanding any act, matter, or thing whatsoever at any time heretofore made, done, committed, or suffered by the said parties hereto of the second part respectively, or by the said [*testator*], deceased, or by any person or persons whomsoever claiming or deriving title through or under the [*testator*], deceased, to the contrary, the said parties hereto of the first and second parts respectively, or some of them, now are seised of or entitled to the moiety hereby expressed to be hereby released of and in the said manor and other hereditaments hereinbefore described, for an estate of inheritance in fee-simple in possession: *And that,* notwithstanding any such act, matter, or thing as aforesaid, they the said parties hereto of the first and second parts respectively, or some of them, now have in themselves full power and absolute authority to release and assure the said moiety expressed to be hereby released of and in the said manor and other hereditaments hereinbefore described, unto the said [*purchaser*] and his heirs, to the uses and in manner aforesaid, according to the true intent and meaning of these presents; *And further,* that the undivided moiety hereby expressed to be

Covenant by vendors that they have not incumbered.

—by cestuis que trust, according to their shares, that the releasors are seised in fee.

Power to convey.

Quiet enjoyment.

just referred to, that, on payment of the money, the mortgagee will re-convey in such manner as the purchaser, his heirs or assigns, shall direct; and the declaration excluding dower may be added, if thought proper.

released of and in the manner and other hereditaments hereinbefore described, shall and may, from time to time, and at all times hereafter, remain and be to the uses hereinbefore expressed concerning the same, and that the same shall and may be peaceably and quietly held and enjoyed (*e*), without any denial, eviction, or interruption, of, from, or by the said parties hereto of the second part, or any of them, or of, from, or by any other person or persons lawfully claiming through or under the said [*testator*], deceased; *And that* free and clear, and freely, clearly, and absolutely discharged or otherwise by the said parties hereto of the second part, or some of them, or the heirs, executors, or administrators of them or of some of them, effectually kept indemnified from and against all and all manner of former and other gifts, grants, estates, titles, charges, and incumbrances whatsoever, had, made, done, committed, or suffered by the said parties hereto of the second part, or any of them, or by the said [*testator*] deceased, by any person or persons whomsoever, claiming through or under them or any of them: *And moreover* that they the said parties hereto of the second part, respectively, and their respective heirs, and every other person lawfully claiming any estate, right, title, trust, or interest in, to, or out of the moiety expressed to be hereby released of and in the manor and other hereditaments hereinbefore described, or any part thereof, by, from, through, or under, or in trust for them or any of them, or by, from, through, or under, or in trust for the said [*testator*], deceased, will or shall from time to time, and at all times hereafter, upon every reasonable request, and at the proper costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, execute, and perfect, or procure to be made, done, executed, and perfected, all such further acts, deeds, matters, and things, conveyances, and assurances in the law whatsoever, for the more effectually conveying and assuring the undivided moiety expressed to be hereby released of and in the said manor and other hereditaments, with the appurtenances, *To the uses* hereinbefore limited concerning the same respectively, or such of them as shall

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Free from incumbrances.

For further assurance.

(*e*) If the mortgage is in fee, this covenant would still be applicable, the word "use," in the singular, being substituted for "uses;" or it might be declared that it shall be lawful for the covenantee and his heirs, and cestuis que use, peaceably to enjoy, &c.

Covenant where mortgage is in fee.

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be then subsisting, as by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel in the law, shall be reasonably advised and required, [so that &c., *ut ante, p.* 77.] PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, that, in case the said [*purchaser*], his heirs, executors, administrators, appointees, or assigns, shall and do pay or cause to be paid unto the said [*vendors*], their executors, administrators, or assigns, on the —— day of —— now next ensuing, the sum of 500*l.* of lawful British money, together with interest for the same after the rate of five pounds for every hundred pounds by the year, free from taxes, and without any other deduction, then and in such case, and immediately after such payment so made, the term of 2000 years hereby limited in use to the said [*vendors*], their executors, administrators, and assigns, as aforesaid, shall cease, determine, and be absolutely void, to all intents and purposes whatsoever, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. AND it is hereby agreed and declared between and by the said parties hereto, that the receipt or receipts in writing of the said [*vendors*], or of the survivor of them, or of the executors or administrators of such survivor, shall be an effectual discharge for the said sum of 500*l.* and interest, or any part thereof respectively, unto the person or persons paying the same; and such person or persons shall not be obliged to see to the application of the monies which in such receipt or receipts shall be expressed to be received. AND the said [*purchaser*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*vendors*], their (*f*) executors, administrators, and assigns, in manner following, (that is to say), that he the said [*purchaser*], his heirs, executors, administrators, appointees, or assigns, will or shall pay or cause to be paid unto the said [*vendors*], their executors, administrators, or assigns, the said sum of 500*l.* of lawful British money, with interest for the same after the rate aforesaid, free from taxes, and without any other deduction except as aforesaid, at the place, and at or on the day or time, and in manner hereinbefore appointed for payment thereof, according to the true intent and meaning of these presents;

Proviso for redemption.

Receipt of mortgagees or of the survivor to be a discharge for mortgage-money.

Purchaser covenants to pay the mortgage-money;

(*f*) If the mortgage is in fee, add—
"heirs."

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And that, after default shall be made in payment of the said sum of 500*l.*, or the interest thereof, or of any part thereof respectively, at or upon the day or time hereinbefore appointed for payment thereof respectively, contrary to the true intent and meaning of these presents, it shall be lawful for the said [*vendors*], (*g*) their executors, administrators, and assigns, from time to time, and at all times thereafter, during the then residue of the said term of 2000 years hereby limited in use to the said [*vendors*] as aforesaid, peaceably and quietly to enter into and upon, and to hold and enjoy, the undivided moiety or half part expressed to be hereby released of and in the said manor and other hereditaments hereinbefore described, with their and every of their rights, members, and appurtenances, and to receive the rents and profits thereof to and for their own use and benefit, without any denial, eviction, or interruption whatsoever, of, from, or by the said [*purchaser*], his heirs or assigns, or any other person or persons whomsoever; *And that* free and clear, and freely, clearly, and absolutely discharged, or otherwise, by the said [*purchaser*], his heirs, executors, or administrators, effectually kept harmless and indemnified of, from, and against all and all manner of former and other gifts, grants, estates, titles, charges, and incumbrances whatsoever: *And moreover*, that he the said [*purchaser*], and his heirs, and every other person lawfully claiming any estate, right, title, or interest in, to, or out of the undivided moiety or half part expressed to be hereby released of and in the said manor and other hereditaments hereinbefore described, or any part thereof, will or shall, from time to time, and at all times hereafter, at the request of the said [*vendors*], their executors, administrators, or assigns, but at the expense of the said [*purchaser*], his heirs, executors, administrators, or assigns, (*h*) *until the equity of*

—for quiet enjoyment after default;

—free from incumbrances.

(*g*) If the mortgage is in fee, say—
"their heirs and assigns, from time to time, and at all times for ever thereafter, peaceably and quietly," &c.

Variations where the mortgage is in fee.

(*h*) If the mortgage is in fee, with a power of sale, substitute for the words in italics—
"until the said hereditaments shall be sold and assured under the power of sale hereinbefore contained, or until the equity of redemption of the said [*purchaser*], his heirs, or assigns, in the said hereditaments, shall be otherwise barred

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redemption in the said moiety or half part shall be released or otherwise extinguished, and afterwards at the costs and charges of the person or persons making such request, make, do, execute, and perfect, or procure to be made, done, executed, and perfected, all such further acts, deeds, conveyances, and assurances in the law whatsoever, for the more effectually conveying and assuring the said undivided moiety or half part of and in the said manor and other hereditaments (*i*), for all the residue which shall be then to come and unexpired of the said term of 2000 years therein, according to the true intent and meaning of these presents, as by the said [*vendors*], their (*k*) executors, administrators, or assigns, or their counsel in the law, shall be reasonably advised and required.

Until default, purchaser to enjoy.

AND it is hereby agreed and declared between and by the said parties hereto, that, until default shall be made in payment of the said sum of 500*l.*, or the interest thereof, or of some part thereof respectively, contrary to the true intent and meaning of the aforesaid proviso and covenant for payment of the same, it shall be lawful for the said [*purchaser*], his appointees, heirs, and assigns, to hold and enjoy the said undivided moiety or half part of and in the said manor and other hereditaments, and to receive the rents and profits thereof for his and their own use and benefit, without the lawful denial, eviction, or interruption whatsoever, of, from, or by the said [*vendors*], or either of them, or the executors, administrators (*l*), or assigns of them or of either of them, or of, from, or by any other person or persons claiming by, from, through, or under them or either of them. IN WITNESS &c. (*m*).

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or extinguished, and afterwards at the expense of the person or persons making such request."

(*i*) If the mortgage is in fee, say—
"unto and to the use of the said [*vendors*], their heirs and assigns, for ever, according to the true intent," &c.

(*k*) If the mortgage is in fee, add—
"heirs."

(*l*) If the mortgage is in fee, instead of
"executors, administrators," say "heirs."

(*m*) The deed will require ad valorem stamps appropriate to the respective amounts of the purchase and mortgage-monies.

37. CONVEYANCE *of* FREEHOLDS *by* APPOINTMENT *and* RELEASE *by* BANKRUPT (*a*) *and his* ASSIGNEES, *and* SURRENDER *of a* TERM *by a* MORTGAGEE (*b*) *who receives the whole of the Purchase-money in part Discharge of a larger Sum due to him.* COVENANT *by the largest* PURCHASER *at an Auction to* PRODUCE TITLE-DEEDS. *Variation where* MORTGAGEE *in* FEE *joins.*

37. BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

THIS INDENTURE, made &c., BETWEEN [*mortgagee*], of &c., of the first part; [*assignees of bankrupt*] (*c*), of &c., as- Parties.

(*a*) The Bankrupt Act, 6 Geo. 4, c. 16, s. 78, authorizes "the Lord Chancellor, [whose jurisdiction is now transferred to the Court of Review, by stat. 1 & 2 Will. 4, c. 56, s. 27], upon the petition of the assignees, or of any purchaser from them of any part of the bankrupt's estate, *if such bankrupt shall not try the validity of the commission, or if there shall have been a verdict at law establishing its validity*, to order the bankrupt to join in any conveyance of such estate, or any part thereof; and if he shall not execute such conveyance within the time directed by the order, such bankrupt, and all persons claiming under him shall be stopped from objecting to the validity of such conveyance, and all estate, right, or title which such bankrupt had therein shall be as effectually barred by such order as if such conveyance had been executed by him." It is conceived that a purchaser has not, in ordinary cases, a right to call upon the assignees to procure the concurrence of the bankrupt, unless he can throw doubt upon the validity of the commission. He may himself petition for such an order, and the Court would then probably direct whether the bankrupt's estate would bear the expense of it or not, according to the circumstances. It is to be remembered, however, that, if the bankrupt allows twelve months to elapse before he petitions for a supersedeas, [or sooner in most cases, see 5 & 6 Vict. c. 122, s. 24], the conveyance to the purchaser will be protected by the 87th section of the act, [except as against the assignees under a subse-

Court of Review may order bankrupt to convey in certain cases.

(*b*) It rarely happens that a person becomes bankrupt without having mortgaged or otherwise incumbered his property. The precedent, therefore, in the text has been adapted to circumstances of this nature. [See some observations, ante, p. 209.]

(*c*) [I. e., the assignees chosen by the creditors, and the official assignee appointed under the provisions of the stat. 1 & 2 Will. 4, c. 56; or, in case of a country fiat, under the stat. 5 & 6 Vict. c. 122, ss. 48, 53. See 3 Mon. D. & D. 324.]

37. BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

signees of the estate and effects of [*bankrupt*], late of &c., a bankrupt, of the second part; the said [*bankrupt*], of the third part; [*purchaser*], of &c., of the fourth part; [*bankrupt's dower trustee*], of &c., of the fifth part; [*purchaser's dower trustee*], of &c., of the sixth part; and [A. B.], of &c., of the seventh part: WHEREAS (*recite indentures of lease and release by which the property was conveyed to the bankrupt to uses for preventing dower, and an indenture of appointment and demise or mortgage by which they were appointed and demised by the bankrupt to the mortgagee for* 500 *years, for securing* 1600*l. and interest*). AND WHEREAS a fiat for a prosecution in bankruptcy, under the hand of the Lord High Chancellor of Great Britain, was, on or about the —— day of ——, duly awarded and issued against the said [*bankrupt*], who hath been thereunder duly found and declared a bankrupt, and the said [*creditors' assignees*] have been duly chosen, by the creditors of the said bankrupt, assignees of his estate and effects, and the said [*official assignee*] hath been duly appointed official assignee under the said fiat. And the appointment of the said [*creditors' assignees*] was duly inrolled in the Court of Bankruptcy, on the —— day of —— last. AND WHEREAS there is now owing to the said [*mortgagee*], for principal and interest (*d*) on the hereinbefore-recited indent-

Recitals.

—of fiat in bankruptcy;

—of amount of monies due on mortgage;

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quent fiat, who do not claim under the bankrupt within the meaning of that clause. *Gould* v. *Shoyer*, 4 Moo. & P. 635.]

It seems that the bankrupt will not be ordered to join in the conveyance on the ground of his having been nonsuited in an action brought by him to try the validity of the commission, if a second action is pending; *Ex parte Thomas*, 2 Gl. & J. 278; nor though he be *nonprossed* in such second action, if the bankrupt will undertake to bring another action: and in this case the petition was ordered to stand over, in order to await the result of such action. *Ex parte Thomas*, 1 Mont. & M'A. 64. [If he does not dispute the validity of the fiat the order is of course. *Ex parte Jackson*, 2 Dea. & C. 458; *Ex parte Brown*, 2 Deac. 479; *Ex parte Bradstock*, 1 Mon. D. & D. 118. See *Ex parte Bolton*, Id. 667.]

As to mortgagees of bankrupt's claim to interest.

(*d*) The mortgagee of a bankrupt's estate is entitled to interest out of the proceeds of the mortgaged property up to the time of payment; but if the security is inadequate to pay the full amount of principal and interest, and he claims to prove the deficiency as a creditor against the estate, he stands, with respect to that claim, on an equal footing with the other general creditors, and consequently his interest runs only to the period of the bankruptcy. Where the assignees, apprehending the estate to be more than adequate to pay the mortgage debt, take upon themselves the sale of the property, they either sell it free from the

37. BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

ure of mortgage, the sum of 1000*l.* and upwards. AND WHEREAS the premises comprised in the said indenture of mortgage were, on the —— day of —— last, put up for sale by public auction by the said [*creditors' assignees*] (*e*), at the Auction Mart in Bartholomew Lane, in the city of London, in —— lots, according to certain printed particulars and conditions of sale; and at such sale the said [*purchaser*] became the highest bidder for, and was accordingly declared to be the purchaser of, the hereditaments hereinafter released, being one of the said lots, at the price or sum of 500*l.* And it hath been agreed by the said [*assignees*], that the said sum of 500*l.* shall be paid by the said [*purchaser*] to the said [*mortgagee*] (*f*), in part satisfaction of his aforesaid mortgage debt (*g*); and the said [*mortgagee*] hath agreed to exonerate the said premises so purchased by the said [*purchaser*] from the whole of his said mortgage debt, and all interest due and to grow due thereon, and (*h*) to surrender the aforesaid term of five hundred years therein, in order to merge the same in manner hereinafter expressed. AND WHEREAS the said [*bankrupt*], at the request of the said [*assignees*], hath agreed to

—of sale of premises by auction.

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mortgage debt, which they pay off out of the purchase-money, or dispose of the equity of redemption only, and then the payment or continuance of the mortgage debt is matter of arrangement between the purchaser and mortgagee. If the mortgage is paid off by the purchaser, he would of course take the conveyance from the mortgagee and the assignees, by the same deed, unless the mortgage was for a term, which it is deemed advisable to keep on foot.

Authority of official assignee.

(*e*) [By the 23rd section of the stat. 1 & 2 Will. 4, c. 56, the official assignee is disabled from interfering with the creditors' assignees in directing the time and manner of effecting any sale of the bankrupt's estates or effects; and this proviso is repeated in the stat. 5 & 6 Vict. c. 122, s. 49, with reference to the official assignee under country fiats appointed by virtue of that act.]

(*f*) If part only of the purchase-money is paid to the mortgagee, and the residue to the assignees, this recital and the statement in the testatum clause will be varied accordingly. Vide ante, p. 205.

(*g*) The present is supposed to be the first of the lots which is conveyed, and therefore the mortgage debt is stated at its full amount. In each subsequent conveyance it will be stated at the amount to which it has been reduced by the application of the prior purchase-money or monies.

(*h*) If the mortgage is in fee, say—

"to release and assure the same in manner hereinafter expressed."

37. BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

join in and execute these presents for the purposes hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in order to carry the said sale into effect, and (*i*) [for the considerations hereinafter mentioned, they the said [*assignees*] and also the said [*bankrupt*], by virtue and in execution of the power or authority reserved to the said [*bankrupt*] by the hereinbefore-recited indentures of lease and release of the —— and —— days of ——, or one of them, and of all other powers and authorities whatsoever enabling them and him, or any of them, in this behalf, at the request and by the direction of the said [*mortgagee*], testified by his executing these presents, *Do* and each of them *Doth*, by this present deed or writing, under their and his respective hands and seals, [executed in the presence of, and attested by, the two credible persons whose names are indorsed hereupon as witnesses attesting the execution thereof by them and him respectively], direct, limit, and appoint that all and singular the —— and hereditaments hereinafter described, and intended to be hereinafter granted and released, with the appurtenances, shall henceforth remain and be, [and that the said indentures of the —— and —— days of —— shall henceforth, as to the same premises so purchased by the said [*purchaser*] as aforesaid, operate and enure], to the uses, and upon and for the trust, in-

Testatum.

Appointment by the bankrupt may be dispensed with.

(*i*) The bankrupt joins in the conveyance in order to guard against the possibility of the bankruptcy not being supported: the assurance ought therefore to be adapted to the nature of his interest, if it were unaffected by the bankruptcy. In the present case, as the bankrupt had a power of appointment under the ordinary uses to prevent dower, he is made, according to the usual practice, to join with the assignees in exercising this power, (vide ante, Vol. 5, p. 172), and also in conveying by lease and release; but the appointment in such a case frequently is, and may very properly be, omitted, because the great probability is, that the bankrupt has no power or estate in him, the title of the assignees under the bankruptcy being unimpeached; and even if it were not, the lease and release would be quite sufficient to vest his whole estate in the purchaser. If the appointment be dispensed with, the clause within brackets should be omitted. The bankrupt's dower-trustee is made a party, because the bankruptcy does not affect *his* estate; but see ante, p. 70.

[The Bankrupt Act, 6 Geo. 4, c. 16, s. 77, enables the assignees to execute powers which the bankrupt may execute for his own benefit; and therefore it is proper, if an appointment is resorted to, that they should join in it.]

37. BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

Further testatum.

In consideration of purchase-money paid to mortgagee, he surrenders, and assignees and bankrupt release.

tents, and purposes hereinafter declared concerning the same. AND THIS INDENTURE ALSO WITNESSETH, that], in consideration of the sum of 500*l.* of lawful British money paid to the said [*mortgagee*] (*k*) by the said [*purchaser*] at or immediately before the execution of these presents, at the request and by the direction of the said [*assignees*], and with the privity and consent of the said [*bankrupt*], testified by their severally executing these presents, the receipt of which sum of 500*l.* in part satisfaction of his said mortgage debt, and in exoneration of the —— and hereditaments hereinafter described and intended to be hereby conveyed from the whole of the same mortgage debt, the said [*mortgagee*] doth hereby acknowledge, and therefrom absolutely doth release and discharge the said [*purchaser*], his appointees, heirs, executors, administrators, and assigns; and the payment of which sum of 500*l.* by the said [*purchaser*] in full, for the absolute purchase of the inheritance in fee-simple in possession of and in the same premises, the said [*assignees*], as such assignees as aforesaid, and also the said [*bankrupt*], do respectively hereby acknowledge, and therefrom do absolutely release and discharge the said [*purchaser*], his appointees, heirs, executors, administrators, and assigns; and in consideration of the sum of 10*s.* of like lawful money to each of the said [*assignees*], [*bankrupt*], and [*bankrupt's dower trustee*], already paid by the said [*purchaser*], the said [*mortgagee*], to the intent that the residue now unexpired of the said term of 500 years so created as aforesaid in the —— and hereditaments hereinafter described and intended to be hereby conveyed, and all other his term or estate therein, (if any), may be merged and extinguished in the freehold and inheritance of the same premises, at the request and by the direction as well of the said [*assignees*] as of the said [*bankrupt*], testified as aforesaid, *Doth* (*l*), by these presents, (made &c., *ut ante, p.* 72), surrender and yield

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(*k*) [In this case all the purchase-money is paid to the mortgagee. Where all or any part of the purchase-money is to go to the assignees, the payment should be made to the official assignee, (unless an order for payment in a different manner has been made), and should be so expressed in the reference to the payment; but the release in the body of the deed should be by all the assignees.]

(*l*) It is more usual, and perhaps more correct, though immaterial as to legal effect, to put the surrender after the release, ut ante, p. 205, n.

37. BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

up (*m*), and the said [*assignees*], as such assignees of the said [*bankrupt*] as aforesaid, and also the said [*bankrupt's dower trustee*], respectively, so far as they lawfully can or may, *Do* and each of them *Doth* bargain, sell, and release; And the said [*bankrupt*] *Doth* grant, bargain, sell, release, and confirm, unto the said [*purchaser*], and his heirs, ALL THAT &c., (*parcels*), which premises are part of the hereditaments comprised in the hereinbefore-recited indentures of lease and release of the —— and —— days of ——, and the indenture of demise or mortgage of the —— day of ——. (*General words*). AND all the estate, right, title, interest, property, possession, equity of redemption, benefit, claim, and demand whatsoever, at law and in equity, of them the said [*mortgagee*], [*assignees*], [*bankrupt*], and [*bankrupt's dower trustee*], respectively, in, to, out of, or upon the same premises, and every or any part thereof. (*Habendum to uses to prevent dower, ut ante, p.* 73). AND the said [*mortgagee*], [*assignees*], and [*bankrupt's dower trustee*], for themselves respectively, and for their respective heirs, executors, and administrators, but each of them so far as regards his own acts and defaults only, hereby respectively covenant and declare with and to the said [*purchaser*], and his heirs, that they the said [*mortgagee*], [*assignees*], and [*bankrupt's dower trustee*], respectively, have not, at any time heretofore, made, done, or committed, or knowingly suffered, any act, deed, matter, or thing whatsoever, by means whereof the —— and premises hereinbefore [appointed], surrendered (*n*), and released, or intended so to be, or any part thereof, are or is incumbered, or otherwise prejudicially affected in any manner whatsoever. AND the said [*bankrupt*] *Doth* hereby, for himself, his heirs, executors, and administrators, covenant (*o*) and agree with the said [*purchaser*], and his heirs, in manner following, (that is to say), that (notwithstanding any act, deed, mat-

Parcels.

All the estate.

Covenant by mortgagees and assignees respectively that they have not incumbered.

Covenant by bankrupt,

that, notwith-

(*m*) If the mortgage is in fee, say—

"The said [*mortgagee*], at the request and by the direction, &c., (*ut supra*), *Doth*, by these presents, bargain, sell, and release."

(*n*) If the mortgage is in fee, omit this word here, and throughout the covenant for title.

(*o*) [A purchaser cannot insist on the bankrupt's covenanting for title; for the bankrupt cannot be compelled even to join in the conveyance. Ante, p. 261.]

37. BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

ter, or thing whatsoever by him the said [*bankrupt*], or any person or persons lawfully claiming from, through, under, or in trust for him, made, done, committed, executed, or suffered to the contrary), [the said [*mortgagee*], [*assignees*], [*bankrupt*], and [*bankrupt's dower trustee*], or some of them, now are, or one of them is, seised (*p*) of the —— and premises hereinbefore [appointed (*q*) and] released, or intended so to be, with the appurtenances, for an absolute and indefeasible estate of inheritance in fee-simple in possession, [or with an absolute power of appointment over the inheritance in fee-simple in possession of and in the same premises;] *And* that (notwithstanding any such act, deed, matter, or thing as aforesaid) they] the said [*mortgagee*], [*assignees*], [*bankrupt*], and [*bankrupt's dower trustee*], or some of them, now have in themselves, or one of them hath in himself, full power and lawful and absolute authority by these presents to [limit, appoint,] surrender, release, and confirm the —— and premises hereinbefore [appointed,] surrendered, and released, or intended so to be, with the appurtenances, to the uses and in manner aforesaid, and according to the true intent and meaning of these presents; *And* that the same —— and premises shall henceforth go, remain, and be to the uses, and upon the trust hereinbefore declared concerning the same, and shall accordingly, at all times for ever hereafter, be held and enjoyed, and the rents and profits thereof be received and taken, without any disturbance or interruption whatsoever from or by the said [*bankrupt*], or any person or persons lawfully claiming from, through, under, or in trust for him; *And that* free and clear, and freely and clearly exonerated and discharged, or otherwise, by him the said [*bankrupt*], his heirs, executors, or administrators, effectually saved harmless and kept indemnified from and against all and all manner of former and other estates, rights, titles, charges, and incumbrances whatsoever, made, done, executed, or suffered by the said [*bankrupt*], or any other person or persons lawfully claiming from, through, under, or in trust for him; *And moreover*, that the said [*bankrupt*] and his heirs, and every person lawfully claiming by, from, through, under,

standing &c., the conveying parties are lawfully seised;

—have power to convey;

—that premises shall remain to uses aforesaid;

—free from incumbrances,

—and for further assurance.

(*p*) This covenant may be very properly omitted.

(*q*) If the appointment is omitted, the reference to it should also be omitted throughout the covenants.

37. BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

or in trust for him or them, will or shall, from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, and execute all such further lawful acts, deeds, conveyances, and assurances whatsoever for the more effectually conveying and assuring the same —— and premises, or any part thereof, to the uses and in manner aforesaid, and according to the true intent and meaning of these presents, as by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel in the law, shall be advised and required. AND WHEREAS, at the sale by public auction hereinbefore referred to, one of the conditions of the said sale was, that the purchaser of the largest of the several lots sold at the said sale should have the custody of the title-deeds relating to the same several lots, and should enter into a covenant with the purchasers of the other lots for the production and furnishing copies and abstracts thereof. AND WHEREAS the said [A. B.] was the purchaser of the largest of the said lots, and accordingly the said title-deeds have been delivered to him pursuant to the said condition of sale. NOW THIS INDENTURE FURTHER WITNESSETH, that, in conformity to the said condition of sale, and in consideration of the premises, the said [A. B.] doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said [*purchaser*], and his heirs, that he the said [A. B.], his heirs, executors, administrators, or assigns, will or shall, from time to time, and at all times hereafter, unless prevented by fire or some other inevitable accident, upon every request in writing, and at the costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, produce and shew, or cause or procure to be produced and shewn, unto the said [*purchaser*], his appointees, heirs, or assigns, or to the counsel, attornies, solicitors, or agents of him, them, or any of them, or at any trial or hearing, commission or examination, in or directed by any court or courts of law or equity, or other court of judicature in the United Kingdom, or otherwise, as often as occasion shall require, all and singular or any of the deeds, instruments, and writings specified in the schedule hereunder written, for the purpose of manifesting and defending the title or possession of him the said [*purchaser*], his appointees, heirs, or assigns, to or of the —— and premises hereby assured, or

Recital of condition of sale, that the largest purchaser should have the custody of the deeds.

Covenant by largest purchaser for production of deeds.

any part thereof; and will or shall, unless so prevented as aforesaid, at the like request, costs, and charges of the said [*purchaser*], his appointees, heirs, or assigns, deliver to him or them, or any of them, any abstract or abstracts, or copy or copies, (such copy or copies to be attested if required), of all or any of the said deeds, instruments, and writings, or any part thereof respectively; and will or shall permit and suffer the said [*purchaser*], his appointees, heirs, or assigns, to compare and examine the same with the originals (*r*). In WITNESS &c.

37. BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

And to deliver copies.

THE SCHEDULE ABOVE REFERRED TO.

(*r*) A permission to *take* copies is frequently contended for on the part of the covenantee, and the argument urged in support of this claim is, that, if the covenant was silent on the subject of the copies altogether, he would be entitled, under the covenant for production simply, to have the deeds produced, and, when produced, might abstract or transcribe them. The covenant, however, is more frequently framed as in the precedent in the text, *i. e.* extending to the *delivery* of copies only. Where this restriction is submitted to, the covenantee ought at least to be allowed to ascertain the accuracy of the copy or abstract delivered by his own examination; and, therefore, such a permission has been introduced. For precedents of covenants for production of title-deeds generally, and the various restrictions introduced into them, vide ante, Vol. 3, p. 643 et seq. The present covenant is absolute, and not defeasible upon the covenantor parting with the deeds, and procuring a similar covenant from the person to whom he delivers them, because the conditions of sale provide for no such qualification of the covenantor's liability.

Whether covenantee ought to be allowed to take copies.

38. RELEASE IN FEE BY BANKRUPT AND ASSIGNEES TO TRUSTEE FOR PURCHASER AND HIS MORTGAGEE; ASSIGNMENT OF TERM.

38. [RELEASE OF FREEHOLDS *by the* ASSIGNEES *of a* BANKRUPT *and the* BANKRUPT *and his* DOWER TRUSTEE *to a* TRUSTEE IN FEE, *by way of* MORTGAGE, *to secure* PART OF THE PURCHASE-MONEY *advanced by a* THIRD PERSON, *and subject thereto in Trust for the Purchaser and his Heirs:* ASSIGNMENT *of a* TERM *by a Trustee to the Mortgagee.*

Parties.

THIS INDENTURE, made the —— day of ——, (in pursuance &c., *ut ante, p.* 72 (*a*)), BETWEEN [*assignees*], of &c., of the first part; [*bankrupt*], of &c., of the second part; [*dower trustee*], of &c., of the third part; [*trustee of term*], of &c., of the fourth part; [*purchaser*], of &c., of the fifth part; [*mortgagee*], of &c., of the sixth part; [*trustee*], of &c., of the seventh part.

Recitals.

WHEREAS (*Recite bankrupt's title, creation and history of the term, proceedings in bankruptcy and sale, ut ante, p.* 262).

Of agreement for loan and mortgage.

AND WHEREAS, the said [*purchaser*] being unable at present to pay the whole of the said purchase-money or sum of 3300*l.*, the said [*mortgagee*] hath consented to lend and advance to him the sum of 2000*l.* towards the same, upon having the re-payment thereof with interest secured upon the said messuage and hereditaments, in the manner hereinafter expressed.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and

In consideration of payment partly by mortgagee and partly by purchaser to

in consideration of the sum of 2000*l.* of lawful British money, part of the said purchase-money or sum of 3300*l.* to the said [*official assignee*], at or before the execution of these pre-

As to the reference to the stat. 4 & 5 Vict. c. 21.

(*a*) [It is altogether indifferent whether the reference to the stat. 4 & 5 Vict. c. 21, is inserted at the commencement, or in the operative part of the deed. In one or two instances in which the reference has been placed in the operative part, it has been repeated in connexion with each set of conveying parties, thus:—"The said A. B. doth, by these presents, made &c., release, and the said C. D., by these presents, made as aforesaid, doth grant, release," &c. But this is very incorrect and inelegant. The statute supplies the place of a lease for a year, executed by all the parties to the release; and, besides, the lease for a year did not, and the statute does not, so much affect the conveying power of the grantors, as confer on the grantee a receiving capacity; and the first reference to the act shews that he has an immediate vested estate in him for all purposes.]

38. RELEASE IN FEE BY BANKRUPT AND ASSIGNEES TO TRUSTEE FOR PURCHASER AND HIS MORTGAGEE; ASSIGNMENT OF TERM.

sents, in hand paid by the said [*mortgagee*], at the request and by the direction and on the behalf of the said [*purchaser*], testified by his executing these presents, and also in consideration of the sum of 1300*l.* of like lawful money to the said [*official assignee*] at the same time in hand also paid by the said [*purchaser*], the receipt and payment of which several sums of 2000*l.* and 1300*l.*, making together the whole of the aforesaid purchase-money or sum of 3300*l.*, he the said [*official assignee*] doth hereby acknowledge, and from the same and every part thereof they the said [*official and creditors' assignees*] do hereby acquit, release, and for ever discharge the said [*mortgagee*] and [*purchaser*], and each of them, and the heirs, administrators, and assigns of them and of each of them; AND ALSO in consideration of 5*s.* apiece to them the said [*assignees*] and [*bankrupt*] and [*dower trustee*] at the same time paid by the said [*trustee*], the several receipts whereof are hereby respectively acknowledged, they the said [*assignees*], as such assignees as aforesaid, and also the said [*dower trustee*], at the request and by the direction and appointment as well of the said [*bankrupt*] as of the said [*assignees*], testified as aforesaid, *Do*, and each of them *Doth*, by these presents, according to their respective estates and interests therein, and so far as they respectively lawfully can or may, bargain, sell, and release, And the said [*bankrupt*] *Doth* grant, bargain, sell, release, ratify, and confirm unto the said [*trustee*], and his heirs, ALL &c., (*parcels and general words and all the estate, ut unte, p.* 73), &c. Together with all deeds, &c., (*ut ante, p.* 206). And the benefit of all covenants for the production of any other deeds, writings, documents, muniments, and evidences of title relative thereto. To HAVE AND TO HOLD the said messuage, hereditaments, and premises unto the said [*trustee*], and his heirs, TO THE USE of the said [*trustee*], his heirs and assigns for ever, upon the trusts, nevertheless, and to and for the intents and purposes, hereinafter expressed and declared, (that is to say), UPON TRUST, in the first place, for securing unto the said [*mortgagee*], his executors, administrators, or assigns, the repayment of the sum of 2000*l.* so as aforesaid advanced and paid by him to the [*official assignee*] for and on behalf of the said [*purchaser*], together with interest for the same from thenceforth, at the rate of 5*l.* per centum per annum, upon the —— day of —— next, without any deduction or abatement whatsoever; And for that purpose, in case the said sum of 2000*l.* and interest

official assignee,

assignees, dower trustee, and bankrupt release to trustee,

—parcels;

—all deeds and covenants for production.

Habendum to trustee in fee.

In trust to secure money advanced with interest.

Power of sale.

38. RELEASE IN FEE BY BANKRUPT AND ASSIGNEES TO TRUSTEE FOR PURCHASER AND HIS MORTGAGEE; ASSIGNMENT OF TERM.

as aforesaid, or any part thereof, should not be so paid by the said [*purchaser*], his heirs, executors, administrators, or assigns, unto the said [*mortgagee*], his executors, administrators, or assigns, on or before the said day hereinbefore appointed for payment thereof, and if the said [*trustee*], his heirs or assigns, or the said [*mortgagee*], his executors, administrators, or assigns, shall give (*power of sale after notice, power to mortgagee to bid, ut ante, Vol. 5, p. 537*); BUT in case the said [*purchaser*], his heirs, executors, administrators, or assigns, should pay unto the said [*mortgagee*], his executors, administrators, or assigns, the said sum of 2000*l.* and interest, at the time and in manner aforesaid, *Then upon trust* that the said [*trustee*], his heirs or assigns, shall and do immediately thereupon convey and assure the said messuage, hereditaments, and premises unto and to the use of the said [*purchaser*], his heirs and assigns for ever, or otherwise as he or they shall direct or appoint, freed and discharged from all and every the trusts, intents, and purposes hereinbefore expressed and declared; *And upon further trust*, that, in the meantime, and until default shall be made in payment of the said sum of 2000*l.* and interest as aforesaid, or any part thereof, the said [*trustee*], his heirs and assigns, shall and do permit and suffer the said [*purchaser*], his heirs and assigns, to enter upon, and to have, hold, and enjoy the said messuage, hereditaments, and premises, and to receive and take the rents and profits thereof to and for his and their own use and benefit. (*Covenant by purchaser with mortgagee for payment of the mortgage-money; covenant by trustee of the legal estate and assignees severally with trustee, that they have not incumbered; covenants by bankrupt with trustee, and also with purchaser, severally, that he has not incumbered, and for further assurance, or full covenants for title, ut ante, p. 256*; *covenants for title by purchaser with trustee, ut ante, p. 258*). AND THIS INDENTURE FURTHER WITNESSETH, (*assignment of term of 500 years to mortgagee, ut ante, p. 202*; *habendum*), *Upon trust* for the better securing unto the said [*mortgagee*], his executors, administrators, and assigns, the due and punctual payment of the said sum of 2000*l.* and the interest thereon as aforesaid, at the time and in the manner hereinbefore appointed for the payment thereof, and subject thereto, (*In trust to attend, ut ante, p. 106*; *covenant by trustee of term that he has not incumbered, ut ante, p. 106*). IN WITNESS &c.]

Proviso for redemption.

Purchaser to enjoy premises until default.

Further testatum, assignment of term.

39. [ASSIGNMENT *of* LEASEHOLDS *by the* ASSIGNEES *of a* BANKRUPT *and the* BANKRUPT, *either to a* PURCHASER *of* ALL THE PREMISES *included in the Lease, or to a Purchaser of* PART OF THEM, *it being intended that he should grant* UNDERLEASES *to the Purchasers of the other Parts* (*a*). (*A short Form*).

39. ASSIGNMENT OF LEASEHOLDS BY BANKRUPT'S ASSIGNEES.

THIS INDENTURE, made the —— day of ——, BETWEEN [*creditors' and official assignees*], of &c., of the first part; [*bankrupt*], of &c., of the second part; and [*purchaser*], of &c., of the third part. WHEREAS (*recite lease, ut ante, p.* 167 (*b*)). AND WHEREAS the said [*creditors' assignees*], are the creditors' assignees, and the said [*official assignee*] is the official assignee of the estate and effects of the said [*bankrupt*], under a fiat in bankruptcy duly issued against

Parties.

Short recital of title of assignees in bankruptcy.

(*a*) [The form of the deed will be precisely the same in both cases. If the purchaser is to grant underleases to the other purchasers, no notice should be taken of this in the assignment to him; and the consideration-money expressed in the assignment will be that which he pays for his own allotment. The different underleases will contain recitals proper to explain the transaction.]

As to purchasers of leaseholds from bankrupt's assignees.

(*b*) [As to the effect of the bankruptcy of a lessee upon the lessor's remedies, vide ante, Vol. 4, pp. 429, et ante, p. 172. If the bankrupt was himself entitled under an assignment, and has covenanted to indemnify his assignor during the remainder of the term, his certificate does not discharge him from future liability, and, therefore, the purchaser may reasonably be asked to enter into the usual covenant of indemnity. This indemnity he is not bound to give (ante, p. 172), and if he consent to do so, he will of course make it the price of the bankrupt's concurrence in the assignment. Where the bankrupt was himself the lessee, or even where he was an assignee, if the purchaser does not covenant to indemnify him, the chain of covenants is broken, and the purchaser may at any time entirely discharge himself from all concern with the lease, by assigning it over, even to a pauper. This is an advantage which a purchaser may not be disposed to forego, for the sake of obtaining the bankrupt's concurrence.]

[There is some difference between the provisions as to leases in the Bankrupt Act, and those in the Insolvent Debtors' Act, (1 & 2 Vict. c. 110, s. 50, ante, Vol. 4, p. 432). If the assignee of an insolvent accept the lease, the insolvent's liability under it is at an end; and the lessor is entitled to apply to the Court for an order directing the assignee either to accept the lease or to deliver it up: but the insolvent has no power to move in the matter.]

Leases of insolvent debtors.

39. ASSIGNMENT OF LEASEHOLDS BY BANKRUPT'S ASSIGNEES.

him on the —— day of ——. AND WHEREAS the said [*purchaser*] hath contracted with the said [*assignees*] for the absolute purchase of the said leasehold hereditaments and premises for the remainder of the said term therein, free from incumbrances, at the price of £——. [AND WHEREAS the said [*bankrupt*] hath agreed to join in these presents in manner hereinafter expressed]. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreements, and in consideration of the sum of £——, already paid by the said [*purchaser*] to the said [*official assignee*], as he doth hereby acknowledge, (from which sum of £——, and every part thereof, the said [*assignees*] do hereby respectively acquit, release, and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, for ever), they the said [*assignees*] *Do* by these presents bargain, sell, and assign, and the said [*bankrupt*] *Doth* grant, bargain, sell, assign, and confirm unto the said [*purchaser*], his executors and administrators, ALL THE SAID hereditaments and premises comprised in, and demised by, the said indenture of lease, with their actual and reputed appurtenances (*c*): And all the estate and interest at law and in equity of them the said [*assignees*] and [*bankrupt*] respectively therein. TO HOLD the said hereditaments and premises unto the said [*purchaser*], his executors, administrators, and assigns, henceforth, during the residue of the said term of —— years, subject to the rent and covenants henceforth on the lessee's part to be respectively paid, observed, and performed, by virtue of the said indenture of lease. AND each of them the said [*assignees*] for himself, his heirs, executors, and administrators, covenants with the said [*purchaser*] that he hath not heretofore done, committed, or been privy to any act or default by means whereof the hereditaments, estates, and premises intended to be hereby assigned, or any of them, are or can be in any way assigned, forfeited, surrendered, incumbered, or im-

Sale by private contract.

Testatum.

Consideration.

Assignees and bankrupt assign.

Parcels.

General words.

Habendum.

Covenants.

(*c*) [The grant of the indenture of lease frequently inserted here is quite superfluous where all the demised premises are assigned. If a part only of the premises is assigned, and it is intended that the assignee should have the lease, an express grant should be inserted. It has been seen (ante, p. 88), that where freeholds have been partitioned, the owner of any share having obtained possession of the title deeds may retain them; but, in the absence of an express grant, this rule might not be extended to the case of a lease, in which the lessee has a peculiar interest, different from that of an assignee of part of the premises.]

As to granting the lease.

peached. (*Covenants for title, &c. by bankrupt, ut ante, p.* 169; *see p.* 266. *If the bankrupt is an assignee of the lease, and has covenanted to indemnify his assignor, add, if such be the agreement, covenant by the purchaser to indemnify the bankrupt, ut ante, p.* 171. *See note* (*g*), *supra, p.* 172).]

39. ASSIGNMENT OF LEASEHOLDS BY BANKRUPT'S ASSIGNEES.

40. CONVEYANCE *in Fee by the* ASSIGNEE *of an* INSOLVENT DEBTOR (*a*), *in which the* INSOLVENT *and the* GRANTEE *of a* REDEEMABLE ANNUITY *join.* SURRENDER *of* TERM *by* ANNUITANT'S TRUSTEE.

40. BY INSOLVENT DEBTOR, HIS ASSIGNEE, AND ANNUITANT.

THIS INDENTURE, made the —— day of ——, BETWEEN [*assignee or assignees*], of &c., of the first part; [*annuitant*], of &c., of the second part; [*annuitant's trustee*], of &c., of the third part; [*insolvent*], of &c., of the fourth part; [*purchaser*], of &c., of the fifth part; and [*purchaser's trustee*], of &c., of the sixth part. WHEREAS the said [*insolvent*], being seised to him and his heirs of the hereditaments hereinafter described, and intended to be hereby assured, by indenture of appointment bearing date on or about the —— day of ——, and made &c.; in consideration of the sum of 1000*l.* then paid by the said [*annuitant*] to the said [*insolvent*], the said [*insolvent*] granted to the said [*annuitant*], his executors, administrators, and assigns, an annuity or yearly rentcharge of 100*l.*, charged upon and issuing and payable out of the hereditaments hereinafter described and intended to be hereby assured: *To hold* the same annuity to the said [*annuitant*], his executors, administrators, and assigns, for the term of ninety-nine years, if three several persons therein named (all of whom are now living), or any or one of them, should so long live; such annuity to be payable quarterly, on &c., and a proportion for any fractional period of a quarter which might happen to precede the expiration thereof; And by the same indenture the said [*insolvent*] appointed

Parties.

Recitals.

—Of grant of redeemable annuity.

(*a*) [As to sales by assignees of insolvent debtors, vide ante, Vol. 1, p. 97; Vol. 8.]

40. BY INSOLVENT DEBTOR, HIS ASSIGNEE, AND ANNUITANT.

that all and singular the hereditaments thereinbefore charged with the payment of the said annuity, should thenceforth remain and be to the use of the said [*trustee*], his executors, administrators, and assigns, for the term of 100 years thence next ensuing, upon certain trusts, for securing the payment of the said annuity of 100*l.*; And in the said indenture was contained a power enabling the said [*insolvent*], his heirs, executors, administrators, or assigns, at any time or times thereafter, to re-purchase the said annuity, on giving seven days' notice to the said [*annuitant*], his executors, administrators, or assigns, and paying to him or them the sum of 1025*l.*, with all arrears of the said annuity, together with a proportional part thereof, up to the time of such re-purchase. AND WHEREAS (*b*), under or by virtue of the provisions of an act of Parliament made and passed in the second year of the reign of her Majesty Queen Victoria, intituled "An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain cases; for extending the Remedies of Creditors against the property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in England," [*or, more concisely,* of the act of Parliament now in force for the relief of insolvent debtors in England], the said [*insolvent*], being then in custody on final

—Of insolvent having taken the benefit of the act.

Recitals of proceedings under stat. 5 & 6 Vict. c. 116.

(*b*) [If the proceedings were under the provisions of the stat. 5 & 6 Vict. c. 116, (authorizing the Court of Bankruptcy to administer relief to insolvent debtors at large), the recital will be as follows:—

"AND WHEREAS, under or by virtue of the provisions of an act of Parliament, passed in the fifth year of the reign of Queen Victoria, intituled "An Act for the Relief of Insolvent Debtors," the said [*insolvent*] not being a trader, (*or*, not owing debts amounting in the whole to 300*l.*), in pursuance of a notice for that purpose duly given by him to one-fourth in number and value of his creditors, and inserted twice in the London Gazette and twice in the —— newspaper, circulating within the county of ——, (wherein he then resided), presented his petition for protection from process, with a proper schedule thereunto annexed, to [*commissioner*], Esquire, a commissioner of bankrupts for the district of ——, within which district the said [*insolvent*] had resided twelve calendar months, whereupon [*official assignee*] was nominated by the said commissioner to be the official assignee of the estate and effects of the said [*insolvent*] (*or*, to the Court of Bank-

40. BY INSOLVENT DEBTOR, HIS ASSIGNEE, AND ANNUITANT.

process for debt (*c*), applied by petition to the Court for the Relief of Insolvent Debtors, praying to be discharged under the provisions of the said act. AND WHEREAS, by an order of the said Court, dated the —— day of ——, duly entered of record in the same Court, and advertised, the said hereditaments hereinafter described and intended to be hereby assured were, with the other real and personal estate of the said [*insolvent*] duly vested in [*provisional assignee*], the provisional assignee for the time being of the estates and effects of insolvent debtors in England. AND WHEREAS, by another order of the said Court, dated the —— day of ——, [*assignee*] was duly appointed to be assignee of the estate and effects of the said insolvent for the purposes of the said act, which appointment, having been accepted by the said [*assignee*], was duly entered of record in the said Court, and advertised. AND

Of the reso-

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ruptcy, (the said insolvent having resided twelve calendar months within the London district), whereupon [*official assignee*] was nominated by the commissioner in rotation acting in the matter of the said petition, to be &c.) AND WHEREAS the said commissioner duly made and signed a final order in writing, dated the —— day of ——, for the protection of the person of the said [*insolvent*] from all process, and for the vesting of his estate and effects in the said [*official assignee*], together with [*creditors' assignee*], an assignee duly chosen by the majority in number and value of the creditors of the said [*insolvent*], who attended before the said commissioner on the said —— day of ——."]

[The recital of the sale, &c. will be the same as that of a sale in bankruptcy, (ante, p. 263), the proceedings in the two cases being assimilated. See stat. 5 & 6 Vict. c. 116, s. 13, and the 11th of the Orders of November 1, 1842, made under that act. 3 Mon. D. & D., App. cvi. The purchase-money will be paid to the official assignee, ut ante, p. 274.]

(*c*) [If the fact be so, say—

Recital of proceedings by insolvent's execution creditor.

"[*execution creditor*], the creditor at whose suit the said [*insolvent*] was so charged in execution, applied by petition to the Court for the Relief of Insolvent Debtors for an order vesting the real and personal estate and effects of the said [*insolvent*] in the provisional assignee for the time being of the estates and effects of insolvent debtors in England, according to the provisions of the said act. AND WHEREAS accordingly by an order," &c.]

40. BY INSOLVENT DEBTOR, HIS ASSIGNEE, AND ANNUITANT.

lution of creditors that the real estate should be sold by auction.

WHEREAS the said [*assignee*], in obedience to the provisions of the said act, convened a meeting of the creditors of the said [*insolvent*] on the —— day of ——, by notice in the London Gazette, and the newspaper called the ——, published and generally circulated in or near ——, where the said [*insolvent*] resided previously to his imprisonment, which notice appeared in the said Gazette and newspaper respectively on the —— day of ——, and at such meeting the major part in value of the creditors of the said [*insolvent*] then present, by writing under their hands, resolved, approved, and directed that the real estate of the said [*insolvent*] should be sold by auction at the —— Inn, in the city of ——, on the —— day of ——, (being more than thirty days after the holding of such meeting), in such lots as the said [*assignee*] should think proper. AND WHEREAS, pursuant to the resolution of the said creditors, and in obedience to the provisions of the said act, the said [*assignee*] caused the hereditaments hereinafter described, and intended to be hereby released (with other part of the real estate of the said [*insolvent*]) to be put up to sale by public auction, at the said —— Inn, in the city of —— aforesaid, on the —— day of ——, now last past, in several lots; And the said [*purchaser*] attended at the said auction, and, being the highest bidder for, was declared the purchaser of, the hereditaments hereby released, and the inheritance in fee-simple thereof, free from all incumbrances (*d*), at the price of £—— (*e*). AND WHEREAS

—Of sale by auction pursuant to resolution.

—That in-

Unnecessary to state payment of the deposit.

(*d*) Some practitioners recite the payment of the deposit to the auctioneer, but, as this is a mere temporary arrangement, and does not interfere with the ultimate destination of the money, it seems better not to notice it in the conveyance. The recital in the text, it will be seen, details with particularity the proceedings respecting the sale, for the purpose of shewing that the sale was conformable to the act. (See *Sidebotham* v. *Barrington*, 4 Beav. 110; *Wright* v. *Maunder*, Id. 512). This seems, in general, to be advisable, but of course is not essential to

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Ad valorem duty not payable on re-purchase-money of annuity.

(*e*) If the assignee sells the estate free from incumbrances, and pays the redemption price of the annuity out of the purchase-money, the ad valorem duty is of course payable on the whole purchase-money; but, if the sale is *subject* to the annuity, the duty only attaches to the actual purchase-money, exclusively of the redemption price of the annuity; for the stamp-act contains no clause applicable to redeemable annuities, similar to that which applies to mortgages, which, whether paid off or not, are considered as forming part of the purchase-money.

40. BY INSOLVENT DEBTOR, HIS ASSIGNEE, AND ANNUITANT.

the said [*insolvent*], at the request of the said [*assignee*] and [*purchaser*], hath agreed to join in the assurance hereby made, and to enter into the covenants on his part hereinafter contained (*f*). AND WHEREAS the said annuity of 100*l.*, granted to the said [*annuitant*] by the hereinbefore-recited indenture, is in arrear, and there is now owing to him for such arrears, up to the day of the date of these presents, the sum of 75*l.* AND WHEREAS it has been agreed that the said sum of 75*l.*, and also the sum of 1025*l.*, being the price or sum to be paid for the re-purchase or redemption of the said annuity, according to the proviso contained in the said indenture (*g*), (which several sums of 75*l.* and 1025*l.* make together the sum of 1100*l.*), should be paid to the said [*annuitant*] out of the said purchase-money or sum of 1500*l.* NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 1100*l.* of lawful British money paid by the said [*purchaser*] to the said [*annuitant*] at or immediately before the execution of these presents, at the request and by the direction of the said [*assignee*], testified by his executing these presents, (being in full for the absolute re-purchase and re-

solvent has agreed to join in conveyance,

—of sum due to the annuitant.

—That annuitant is to be paid off out of the purchase-money.

Testatum.

In consideration of purchase-money paid to annuitant and assignee, they and insolvent

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the validity of the sale. Where brevity is desired, after the recital of the appointment of the assignee, the following recital may be used :—

" AND WHEREAS the said [*assignee*], pursuant to the provisions of the said act, offered the hereditaments hereinafter described and hereby released (being part of the real estate of the said [*insolvent*]) for sale by public auction, at the —— Inn &c., on the —— day of —— last; and at such auction the said [*purchaser*] became the purchaser thereof in fee-simple, free from all incumbrances, at the sum of £——."

Shorter recital of sale by auction.

If the sale be of leaseholds, as they are not within the section of the act requiring a sale by auction, &c., it will be sufficient to notice the contract for sale in general terms, without referring to the mode of sale. Where a sale *by auction* is requisite, it seems advisable to keep a copy of the printed particulars of sale.

(*f*) It is usual to require the concurrence of the insolvent, but there seems to be no power to compel him to join, and his non-concurrence would clearly be no objection to the title ; his covenants for title are commonly of very little value, and therefore may be properly omitted.

As to the insolvent concurring in the conveyance.

(*g*) Unless the deed were executed on one of the quarterly days of payment, a proportion of the annuity for the fractional period of the current quarter would also be payable to the grantee under the proviso for re-purchase.

40. BY INSOLVENT DEBTOR, HIS ASSIGNEE, AND ANNUITANT.

demption of the said annuity as aforesaid), *And also*, in consideration of the further sum of 400*l.* at the same time paid by the said [*purchaser*] to the said [*assignee*], the receipt and payment of which several sums of 1100*l.* and 400*l.* (making together the said purchase-money of 1500*l.*) they the said [*annuitant*] and [*assignee*] do hereby respectively acknowledge, and therefrom do absolutely discharge the said [*purchaser*], his appointees, heirs, executors, administrators, and assigns, for ever, by these presents; *And also* in consideration of 10*s.* of like lawful money at the same time paid by the said [*purchaser*] to each of them the said [*insolvent*] and [*trustee of term*], (the receipt whereof is hereby acknowledged), he the said [*assignee*], according to his estate, right, title, and interest, (as such assignee as aforesaid), with the privity and approbation of the said [*insolvent*], testified by his executing these presents, *Doth*, by these presents (made &c., *ut ante, p.* 72) (*h*), bargain, sell, and release; And the said [*insolvent*] *Doth* grant, bargain, sell, release, and confirm; And the said [*trustee of term*], at the request and by the direction as well of the said [*annuitant*], as of the said [*assignee*], and with the consent and approbation of the said [*insolvent*], testified as aforesaid, and to the intent that the residue of the said term of ninety-nine years created by the hereinbefore-recited indenture of the —— day of ——, and all other the term and estate of the said [*trustee of term*] may be merged and extinguished, *Doth* assign, surrender, and yield up; And the said [*annuitant*] *Doth* remise, release, and quit-claim unto the said [*purchaser*] and his heirs, ALL &c., (*parcels and general words*); And all the estate, &c. of the said [*assignee, insolvent, annuitant, and his trustee*]; And all deeds, &c.; (*Habendum to uses to prevent dower, ut ante, p.* 73; *Covenants by assignee, annuitant, and his trustee, each for his own acts, &c., that they have done no act to incumber; Covenants for title by insolvent, similar to bankrupt's covenants in the last precedent, omitting only, if the assignee and insolvent do not make an appointment, the parts relating to the appointment in that precedent.*) IN WITNESS &c.

release and trustee of term surrenders to purchaser.

Parcels.

Habendum to uses.

(*h*) The immediate estate being in a termor, the lease-for-a-year stamp, and the reference to the statute, in this instance, might safely be dispensed with, as the points of objection adverted to in a former note (p. 205) do not occur here, the identity being free from doubt and the term having been created by appointment. For the form of the conveying part in that case, vide ante, p. 197.

41. BARGAIN *and* SALE (*a*) (*to be inrolled in Chancery*) *by* TENANT *in* TAIL *to a* PURCHASER *in* FEE. (*Variation where the* WIDOW *of the deceased Owner joins in order to* RELEASE *her* DOWER).

41. BARGAIN AND SALE INROLLED, FROM TENANT IN TAIL.

THIS INDENTURE, made the day —— of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part (*b*). WHEREAS [*testator*], of &c., the grandfather of the said [*vendor*], by his last will and testament, bearing date on or about the —— day of ——, duly executed and attested as by law was then required for the devise of freehold estates, gave and devised the —— and hereditaments hereinafter described, and hereby bargained and sold, or intended so to be, by the description of "All that &c.," *To the use* of his son [*name*], the father of the said [*vendor*], during his life, and after his decease (subject to the usual limitation to trustees for preserving contingent remainders), *To the use* of the first and other sons of the said [*father*], severally and successively, and the heirs of their respective bodies, with such remainders over as are therein mentioned, (*Death of testator, &c., ut ante, p.* 247). AND WHEREAS the said [*vendor*] is the eldest son of the said [*father*] by [*mother*], his late wife deceased, who were married at the parish church of ——, on the —— day of ——, and the said [*vendor*] (who was the first issue of such marriage) was baptized at the meeting-house at ——, belonging to the sect or denomination of Protestant Dissenters called Independents, on the —— day of ——. AND WHEREAS the said [*father*] died on the —— day of ——, and was interred in the burial-ground adjacent and belonging to the said meeting-house, on the —— day of —— last. AND WHEREAS

Parties.

Recital of the vendor being tenant in tail, and

the agreement

(*a*) Bargains and sales inrolled are now little used as assurances from vendor to vendee, because they do not admit of the limitations usual in purchase-deeds; for, as they operate simply by transferring the use to the bargainee from whom has moved a valuable consideration, it is obvious that uses cannot be raised under a power of appointment contained in a bargain and sale, since no valuable consideration could move from a person who at the time was unascertained, which is the situation of an appointee until the execution of the appointment.

As to bargains and sales inrolled.

(*b*) If the dowress joins, the deed will be of three parts, and the dowress will be of the third part.

41. BARGAIN AND SALE INROLLED, FROM TENANT IN TAIL.

for the purchase.

Testatum.

In consideration of purchase-money, and to bar all entails, &c., vendor conveys to purchaser.

Habendum to

the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the said —— and hereditaments for an estate in fee-simple in possession at the price or sum of £——(*c*). NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— of &c. paid by the said [*purchaser*] to the said [*vendor*] at or before the sealing and delivery of these presents, the receipt &c., and for the purpose of barring and extinguishing all estates tail of the said [*vendor*] of and in the said —— and hereditaments, and all estates, rights, titles, powers, and interests, to take effect after the determination or in defeazance of the same estates tail, and for the purpose of assuring and limiting the said hereditaments in the manner hereinafter expressed, he the said [*vendor*] *Doth* by these presents, grant, bargain, and sell (*d*), unto the said [*purchaser*] and his heirs; ALL THOSE (*insert the parcels and general words*); And all the estate, right, title, interest, benefit, claim, and demand whatsoever, both at law and in equity, of the said [*vendor*], in, to, and upon the said hereditaments and premises, and all deeds, evidences, and writings relating to the said hereditaments and premises, exclusively of any other hereditaments, now in the custody or power of the said [*vendor*]. TO HAVE AND TO HOLD the said hereditaments

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That dowress had agreed to join.

(*c*) "AND WHEREAS the said [*dowress*], in consideration of the affection which she bears to her son the said [*vendor*], and in order to enable him to carry into effect the hereinbefore-recited contract, has agreed to release her dower in the said hereditaments, in manner hereinafter expressed."

Release by dowress.

(*d*) "And the said [*dowress*], to the intent that all her claim, right, and title to dower in the —— and hereditaments hereinafter described, and hereby intended to be released, may be absolutely released and extinguished, at the request and by the direction of the said [*vendor*], testified by his executing these presents, *Doth* by these presents remise, release, and quit-claim unto, &c."

Nature of dowress's interest.

Until dower has been assigned, *i. e.* until it has been set out by the sheriff by metes and bounds, the dowress has a right only and not an estate; for which reason, her concurrence is not essential in the lease for a year, when such an instrument is executed. If she marries a second husband, they must both join in releasing her dower, the deed being of course acknowledged by the wife.

41. BARGAIN AND SALE INROLLED, FROM TENANT IN TAIL.

and premises hereby bargained and sold, or intended so to be, with their appurtenances, unto and To THE USE of the said [*purchaser*], his heirs and assigns for ever, freed and absolutely discharged of and from all estates tail of the said [*vendor*], and all estates, rights, titles, interests, and powers to take effect after the determination or in defeazance of the said estates tail; and to or for no other use, intent, or purpose whatsoever. And the said [*purchaser*] doth hereby declare that his present or any future wife who may happen to survive him shall not be entitled to dower in or out of the said hereditaments and premises. *And* the said [*vendor*] (*e*), for himself, his heirs, executors, and administrators, doth covenant and agree with the said [*purchaser*] and his heirs, by these presents, in manner following, (that is to say), that (for and notwithstanding any act, deed, matter, or thing, done, committed, or suffered by the said [*vendor*] or by the said [*testator*], the testator deceased, or by any person or persons lawfully claiming through, under, or in trust for them or either of them) he the said [*vendor*] now hath in himself full power and lawful and absolute authority by these presents to bargain, sell, and assure the said hereditaments and premises mentioned to be hereby assured as aforesaid, with their appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns for ever, and in manner aforesaid, according to the true intent and meaning of these presents; (*And for peaceable enjoyment, free from incumbrance, and further assurance, ut ante, p.* 165). IN WITNESS, &c.

purchaser in fee.

Covenants for the title by vendor with purchaser.

(*e*) If the dowress joins, add covenant by her, that she has done no act to incumber. It should seem, too, that she ought to covenant for further assurance; for, where a person joins in a conveyance for the purpose of releasing his interest, he ought, it is conceived, to bind himself to do whatever shall be necessary to confirm his act. This reasoning indeed might seem to apply to a certain extent, to trustees, who are not usually required to enter into such a covenant. A mere trustee, however, is always bound, at the instance of the person beneficially entitled to perfect the title of the latter by vesting the legal estate in him; and upon this ground, probably, it is that trustees are considered to be exempt from the obligation of entering into an express covenant for further assurance.

As to covenants by dowress.

42. SURRENDER OF COPYHOLDS BY TENANT IN TAIL.

42. [SURRENDER *out of Court* (*a*) *of* COPYHOLDS *by* TENANT *in* TAIL *in Possession* (*b*), *to the use of a Purchaser in Fee. Variations where there is a Protector who gives his* CONSENT *in* PERSON, *or by a* DEED *to be entered on the Rolls* (*c*).

The manor of ——, *in the county of* ——. } BE IT REMEMBERED, that, on the —— day of ——, in the year ——, [*vendor*], one of the customary tenants of the said manor, came before [A. B.], Esq., steward [*or* deputy steward, *as the case may be*] of the said manor, and in consideration of the sum of £—— sterling by [*purchaser*], of &c., to him the said [*vendor*] then in hand paid, did out of Court (*d*) surrender into the hands of the lord of the said

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(*a*) [Where the surrender is made in Court, the form runs thus:—

"*The manor of* ——, *in the county of* ——. } A general customary Court of [*lord*], lord of this manor, holden [in and] for the said manor, on the —— day of ——, in the year ——, before [*steward*], steward of this manor. At this Court came [*vendor*], of &c., one of the customary tenants of this manor, and in consideration of the sum of £—— sterling, by [*purchaser*], of &c., to him the said [*vendor*] then in hand paid, in open Court surrendered into the hands of the lord of this manor, by the hands and acceptance of the said steward, by the rod, according to the custom of the manor, ALL &c." *ut supra.*

As to barring legal entails in copyholds.

(*b*) The recent act, it will be remembered, has made legal entails in copyholds barrable by surrender only, in the form of which there is so little of peculiarity, that a variation in the few words, referring to the nature of the surrenderor's estate, would render the precedent in the text applicable to a surrender by a tenant in fee-simple. It seems to be quite superfluous to state on the memorandum the intention to bar the entail.

(*c*) [For the form of the accompanying deed of covenants for title, vide ante, p. 187.]

(*d*) [If the protector gave his consent in person, say—

"with the consent of [*protector*], of &c., the protector of the

42. SURRENDER OF COPYHOLDS BY TENANT IN TAIL.

manor, by the hands and acceptance of the said steward, [*or* deputy steward, *as the case may be*], by the rod, according to the custom of the said manor, ALL THAT AND THOSE [*parcels*], with the appurtenances to the said hereditaments and premises belonging; (to which hereditaments and premises the said [*vendor*] was admitted tenant at a general Court held for the said manor on the —— day of ——, to hold to him the said [*vendor*], and the heirs of his body, according to the form and effect of a certain will therein mentioned or referred to); And all the estate, right, title, interest, use, trust, benefit, property, claim, and demand whatsoever of the said [*vendor*], in, to, out of, and upon the said hereditaments and premises; *To the use* of the said [*purchaser*], his heirs and assigns for ever, at the will of the lord, according to the custom of the said manor (*e*).

Taken and accepted the day and year first above written by me, } [A. B.], Steward [*or*, Deputy Steward] of the said manor.]

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settlement made by the will hereinafter mentioned, to the said steward at the same time given by the said [*protector*],"

If the surrender is made out of Court, the memorandum must be signed by the protector, but where the surrender is made in Court, this is not requisite. Stat. 3 & 4 Vict. c. 74, s. 52.]

(*e*) [If the consent was given by a separate deed, it will be proper, though not necessary, to say here—

Reference to deed of consent by protector.

"a certain deed-pool, bearing date the —— day of ——, under the hand and seal of [*protector*], of &c., the protector of the settlement made by the said will, whereby the said [*protector*] did consent to such disposition or surrender, being first produced to the steward."]

43. CONSENT OF PROTECTORS OF ENTAIL IN COPYHOLDS.

43. [CONSENT *of* PROTECTORS *of* ESTATE TAIL *in* COPYHOLDS, *to the barring of such Entail, by a Deed Poll, to be entered on the Court Rolls* (*a*).

Recital that protectors are willing to consent.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*protectors*], of &c., send greeting. WHEREAS (*recite will and subsequent events shewing the vendor's title*). AND WHEREAS the said [*protectors*] are desirous of enabling the said [*vendor*] to dispose of the said hereditaments devised by, or now subject to, the limitations and uses of, the said will of the said [*testator*] deceased. NOW KNOW YE, AND THESE PRESENTS WITNESS, that, for effectuating such desire, and in exercise of all powers enabling them in this behalf, they the said [*protectors*] as protectors of the settlement made by the hereinbefore-recited will, DO, and each of them DOTH, by these presents, consent to any and every disposition which the said [*vendor*] shall or may, at any time or from time to time hereafter, make of the said hereditaments devised by, or now subject to the limitations or uses of, the said will of the said [*testator*], deceased, or of any of such hereditaments, or of any part thereof, to, for, or upon any uses, trusts, ends, intents, or purposes whatsoever. IN WITNESS (*b*), &c.]

Testatum.

Protectors consent to disposition by tenant in tail.

As to deed of consent.

(*a*) [This must be done at or before the time of entering the surrender or disentailing deed on the rolls. The above form may be readily adapted to the case of a consent given to a disposition of freehold lands. In that case it must be inrolled in Chancery, at or before the time of inrolling the deed of disposition.]

(*b*) [This deed, in the case of copyholds, must be produced to the lord or steward at or previously to the surrender, who is to indorse on it a memorandum of such production, and enter the deed and indorsement on the rolls, and then indorse on the deed a further memorandum testifying such entry. The first indorsement may be in these terms:—

Memorandum of production of deed of consent to steward.

"Memorandum, that on the —— day of ——, and previously to a surrender of the copyhold hereditaments within mentioned or referred to, made by the within-mentioned [*vendor*], on the same day, into the hands of the lord of the manor of ——, by the hands and acceptance of me [*steward*], steward of the said manor, the within-written instrument or deed-poll was produced to me, as I do hereby acknowledge.

[*Signature.*]"

44. [RELEASE *in Fee* (*to be inrolled in Chancery*) *by* TENANT *in* TAIL *in Possession, to* USES *for* PREVENTING DOWER *in favour of a Purchaser. The Vendor's* WIFE JOINS *for the purpose of* EXTINGUISHING HER DOWER. 44. BY TENANT IN TAIL IN POSSESSION.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., and [*wife*], his wife, of the first part; [*purchaser*], of the second part; and [*trustee*], of &c., of the third part. WHEREAS (*recite will or settlement creating the entail, and subsequent events*). AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the said hereditaments and the inheritance thereof in fee-simple in possession, free from incumbrances, at the price of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of the sum of £—— of lawful British money, by the said [*purchaser*] to the said [*vendor*] in hand paid at or immediately before the execution of these presents, (the receipt whereof the said [*vendor*] doth hereby acknowledge, and therefrom doth release and for ever discharge the said [*purchaser*], his heirs, executors, administrators, and assigns (*a*)); He the said [*vendor*], DOTH, by these presents, Parties. Testatum. Release by te-

(*a*) In preparing forms under the recent act, the Editor has not in general referred expressly to the statute, because it is inconsistent with usage in conveyancing, from which there is no reason for departing. Besides, it may happen that an assurance derives its efficacy from *several* statutes. In such cases the plan would be inconvenient, and, in unskilful hands, might be mischievous. The reference to the act for dispensing with a lease for a year is rendered necessary by the express provisions of that act. Remark upon the precedent in the text.

[A doubt has been suggested as to the propriety, where conveyances by lease and release are executed under the stat. 3 & 4 Will. 4, c. 74, of causing the lease for a year, as well as the release, to be inrolled, or acknowledged, as the case may be. While it was still necessary actually to execute the lease for a year, it was the general opinion that the lease for a year should be inrolled. Thus, Mr. Hayes has said—"The best advice, perhaps, which can be given to the general practitioner is, to As to inrolling or acknowledging the lease for a year in assurances under the stat. 3 & 4 Will. 4, c. 74.

44. BY TENANT IN TAIL IN POSSESSION.

made &c., (*ut ante, p.* 72), grant, bargain, sell, and release, and the said [*wife*], with the privity and approbation of the

nant in tail and his wife.

adopt in every case the common assurance by lease and release, taking care to inrol both instruments." 1 Introd. to Conv. p. 161. See 2 Id. 175, n. Again, in Vol. 2, p. 222—"Where a married woman is a conveying party to deeds of lease and release, there must be a memorandum for each of the deeds; though, in point of legal effect, they form but one assurance, and may be included in the same certificate and affidavit." "Where the wife's freehold or inheritance is intended to pass, it is proper that she should join in and acknowledge both the lease and release; first, because the wording of the act of 3 & 4 W. 4, c. 74, s. 77, ('as fully and effectually as she could do if she was a feme sole'), admits of a doubt whether the act has rendered her simple *deed*, as such, effectual, or has only endowed her under certain conditions with capacity to convey by the ordinary modes of assurance; and, secondly, because her execution of both instruments renders the conveyance effective independently of the marriage. But where the wife has a mere title to dower, or an estate or interest which the deed of release is in itself adequate to pass, it would, of course, be supererogatory to make her a party to the lease for a year." To the same effect Sir E. Sugden says—"Although both deeds must be inrolled, yet a lease and release by a tenant in tail will still operate as a conveyance, as they did before the late statute." 2 Vend. 290; and see 2 Sanders on Uses, 5th Ed. 83, n.]

[Although in actual practice it may be the duty of a professional man to sanction even the most trivial doubt, by acting as if it were valid, rather than subject his client to any risk, it is to be regretted that writers of eminence should sometimes forget that their duty to the public is, on the contrary, to discourage every inconvenient punctilio which is not clearly sustainable on principle. That the opinions cited above are wholly unfounded will be perceived on a moment's consideration. To take first the case of a disposition by tenant in tail the provision for inrolment is in these words:—(Sect. 46.) "That every disposition of lands under this act, by a tenant in tail thereof, shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition, if his estate were an estate at law in fee-simple absolute: provided, nevertheless, that no disposition by a tenant in tail shall be of any force either at law or in equity under this act, unless made or evidenced by deed." Let A. be tenant for life with remainder to B. in tail; A. as protector consents that B. shall bar the entail, but does not intend to convey his own estate; it is clear that a deed of grant by B., in which A. shall join to testify his consent, and duly inrolled, will be sufficient. The conveyance is to be such as would be sufficient if the tenant in tail's estate were an estate in fee-simple absolute, i. e. a fee-simple unconditional and indefeasible. The act does not say a fee-simple in actual possession and occupation; and where the estate tail is in remainder or reversion, the conveyance is sufficient if it would convey a fee-simple in remainder or reversion. If the tenant in tail has executed a lease, (whether under a power or out of his owner-

said [*vendor*], her husband, DOTH remise, release, and quit claim unto the said [*purchaser*], and his heirs, ALL THAT,

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Parcels.

ship is immaterial, for in either case his estate tail is turned into a reversion*), without any ulterior object, and afterwards agrees to sell the inheritance to his tenant, can it be doubted that a mere release inrolled would effect the object? And if so, what difference can it make at law that the lease was executed for the purpose of giving effect to the release? In short the bargain and sale for a year is good, independently of the statute, and the only assurance which operates under the statute is the disentailing release. When it is said that a lease and release are *one assurance*, nothing more is meant than that if the one deed refers to the other they must be construed together. This one assurance, however, consists of two deeds, which, at law, are presumed to be in the custody of different persons, (*Jenkin* v. *Peace*, 6 Mee. & W. 722, ante, p. 89), one of which must be executed before the other, and when so executed is perfectly and completely operative, whether made by a tenant in tail, or by a tenant in fee, without the aid of any act of Parliament besides the Statute of Uses.]

[Next, as to the conveyance by a married woman. The sections on which the effect of such a conveyance depends are the 77th and the 79th. The former enacts that it shall and may be lawful for every married woman (except in the case of her being a tenant in tail, which is provided for elsewhere) "*by deed* to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in lands of any tenure &c. *as fully and effectually as she could do if she were a feme sole*, save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual, unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed." The 79th section requires the acknowledgment of "every deed to be executed by a married woman for the purposes of this act." A husband and his wife in right of the wife are entitled to an estate in fee-simple in possession; the husband executes a lease for a year, whereupon the estate which the wife or the husband in her right has in the land, becomes a fee-simple in reversion expectant on the term of one year, determinable on the decease of the husband or wife. Such an estate, if the wife had it in herself, and were a feme sole, she could dispose of to the bargainee for a year by release, and such release, executed and acknowledged by her with her husband's concurrence, will operate under the act. The lease for a year can be made by the husband without his wife's concurrence, and that being made, the release is the proper assurance, and that alone which requires the aid of the statute. When the husband's concurrence is dispensed with, under

* [The tenant in tail, though his power of alienation is controlled by the statute de donis, has the entire estate tail in him, and therefore his demise, though voidable by the issue, turns the estate tail into a reversion. *Doe* d. *Southouse* v. *Jenkins*, 3 M. & P. 59.]

44. BY TENANT IN TAIL IN POSSESSION.

(*parcels and general words*); and all the estate, right, title, interest, property, possession, benefit, claim, and demand

All the estate.

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the 91st section, the lease for a year, if executed, must, of course, be acknowledged.]

As to dispensing with the lease for a year in assurances under the stat. 3 & 4 Will. 4, c. 74.

[The point has acquired additional importance since the passing of the act for dispensing with a lease for a year, and several practitioners have advised that releases framed under that act should not be used when they are required to bar estates tail, or to pass the estates of married women; and some gentlemen, it is understood, have even rejected titles founded on such assurances. The stat. 4 & 5 Vict. c. 21, supplies the want of execution of the lease for a year, but does not, in terms at least, supply any other ceremony, such as entry under it, (ante, Vol. 3, p. 243), or inrolment or acknowledgment of it. As we have seen that (with one exception) it was never necessary to inrol or acknowledge the lease for a year, the objection is obviously untenable. But it may be conclusively answered, even with regard to the excepted case, or upon the assumption that such inrolment or acknowledgment was necessary in all cases. The object of the statute 3 & 4 Will. 4, c. 74, is to give to tenants in tail and married women the same power of alienation in every respect that tenants in fee-simple and femes sole their contemporaries may have, subject only to the restriction that they must aliene by deed, and such deed must be inrolled in the one instance and acknowledged in the other. If a new instrument of conveyance were introduced by the legislature, such an instrument being sealed and delivered, and inrolled or acknowledged, would operate under the stat. 3 & 4 Will. 4, c. 74, being (in the case of a tenant in tail) "one of the assurances by which the tenant in tail could have made the disposition if his estate were an estate at law in fee-simple absolute," that is to say, could have made the disposition at the time when he did make it under the act, and being (in the case of a married woman) a deed effectual to dispose of lands &c. belonging to a feme sole. It is to no purpose to object that the stat. 4 & 5 Vict. c. 21, supplies the want of certain solemnities only. The short answer is, that, no matter how, a deed executed in pursuance of that act is a deed by which a tenant in fee-simple absolute or a feme sole can dispose of his or her estate.]

As to the lease for a year in Ireland.

[The Irish Acts, 9 Geo. 2, c. 5, and 1 Geo. 3, c. 3, (ante, Vol. 2, p. 153), only make the recital of the lease for a year evidence of it; and do not, of course, supply the want of proof of inrolment. (Ante, Vol. 1, p. 170). If inrolment, or acknowledgment of the lease for a year, when executed, therefore, were necessary under the statute for abolishing fines and recoveries in Ireland, (4 & 5 Will. 4, c. 92, which, in this respect, is the same as the English statute), those acts do not make it unnecessary. But we have seen that such inrolment or acknowledgment is not necessary, except where a married woman conveys without the concurrence of her husband.]

As to lands di-

[The pertinence of the objection under consideration, in cases where the assurance is altogether fictitious, and owes its effect, in the mode in which it operates, entirely to the statute for the abolition of fines and recoveries, remains to be considered. By sect. 53 of the English act,

whatsoever, both at law and in equity, or otherwise howsoever, of them the said [*husband*] and [*wife*], his wife, respectively, in, to, of, and upon the said hereditaments and premises; To HAVE AND TO HOLD the said hereditaments and premises unto the said [*purchaser*], and his heirs for ever, (absolutely free and discharged of and from all estates tail of the said [*vendor*], and all estates, rights, titles, interests, and powers to take effect after the determination or in defeazance of the same estates tail, and also freed and discharged of and from all right and title of the said [*wife*] to dower or thirds, and every other estate and interest of the said [*wife*] therein), To THE USES, and upon the trusts, and for the intents and purposes hereinafter expressed, that is to say, (*uses to prevent dower, and covenants for title, ut ante, p.* 73, *et seq., omitting the covenant that the vendor is lawfully seised*). IN WITNESS (*b*) &c.]

44. BY TENANT IN TAIL IN POSSESSION.

Habendum,

(free from all entails, &c.,

and dower),

to uses to prevent dower.

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an equitable tenant in tail of copyholds is enabled "by deed to dispose of such lands under this act, in the same manner in every respect as he could have done if they had been of freehold tenure;" such deed to be entered on the court rolls. The disposition by tenant in tail of freehold lands, whether the entail is legal or equitable, is to be such as would be proper were his estate an estate *at law* in fee-simple absolute. It is clear, therefore, that before the stat. 4 & 5 Vict. c. 21, was passed, a lease for a year, as well as a release, must have been executed to dispose of an equitable estate tail in copyholds, under the Fines and Recoveries Abolition Act: and as the 53rd section requires the entire assurance to be inrolled, such lease for a year must have been inrolled. But as a lease for a year may now be dispensed with in disposing of a fee-simple absolute at law, it may be dispensed with in disposing of an equitable entail in copyholds under the act. Sect. 71 of the same act provides for the disposition of lands to be sold, where the money to arise from such sale is subject to be invested in the purchase of other lands to be settled, and directs that where the lands to be sold are of freehold tenure, and held for an estate of freehold, they shall, for the purposes of the act, be treated as the lands to be purchased. Here, again, for the reasons already given, the lease for a year is immaterial; because the barring of the estate tail, &c., under the act, is no part of its office.]

rected to be sold.

(*b*) [For forms of acknowledgment, see Vol. 5, p. 610; and see the enactments and decisions stated, Vol. 1, p. 243.]

45. DISENTAILING ASSURANCE previous to conveyance to purchaser.

45. [DISENTAILING ASSURANCE *by* TENANT IN TAIL *in* POSSESSION, *preparatory to a Conveyance to a Purchaser. Variation where the Vendor's Estate is in* REMAINDER, *and the* PROTECTOR *consents to the disposition by the same deed* (*a*). (*A very short Form.*)

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*tenant in tail*], of &c., of the one part (*b*); and [*releasee*], of &c., of the other part; WITNESSETH, that (*c*)

Testatum.

the said [*tenant in tail*] (*d*) DOTH, by these presents, (made in pursuance of an act of Parliament passed in the fourth year of the reign of Queen Victoria, intituled, "An act for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties (*e*),") grant, release, and confirm unto the said [*releasee*], and his

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As to barring entail by a distinct deed.

(*a*) [Where the conveyance to the purchaser would extend to any length, a saving of expense is effected by executing a separate disentailing assurance to the use of the tenant in tail himself. The subsequent conveyance to the purchaser will contain the recitals of the vendor's title, and will be in the usual form of a conveyance by an owner of the fee under limitations to prevent dower. Vide ante, p. 68. If the vendor's wife has a title to dower, her concurrence in the latter deed alone will be sufficient.]

[This course cannot be adopted in the case of a purchase of a bankrupt's estate from the commissioners, because the disposition in that case is required to be a disposition to a purchaser for valuable consideration for the benefit of the creditors. See the precedent, infra.]

(*b*) [If the protector joins, he will be made a party of the second part; and if the estate of the tenant in tail is in remainder, the conveyance may be by grant merely, ut infra, p. 293.]

(*c*) [The nominal consideration is omitted in order to exclude the construction that the deed operates as a bargain and sale, in which case it would be liable to a stamp of £5, and the uses would not be executed by the statute.]

Consent of protector.

(*d*) "With the consent of the said [*protector*], as protector of the settlement creating the estate of the said [*tenant in tail*]."

(*e*) [If the tenant in tail is not entitled in possession, these words and the word "release" in the granting part may be omitted, and the lease for-a-year stamp may be saved.]

heirs, ALL [*parcels*] and all other the hereditaments and premises comprised in and settled by an indenture of release, dated &c., and made &c. [*the settlement*]; together with all the rights, members, and appurtenances, to the said hereditaments and premises or any of them now or heretofore in fact or reputation belonging. AND all the estate, right, title, and interest of the said [*tenant in tail*] in or to the said hereditaments and premises. TO HOLD the said hereditaments and premises (*f*) unto the said [*releasee*] and his heirs, to such uses, and for such intents, as the said [*tenant in tail*] shall by any deed appoint, and in default of and subject to any such appointment, to the use of the said [*tenant in tail*] and his assigns, during his life, without impeachment of waste; with remainder to the use of the said [*releasee*], his heirs and assigns, during the life of the said [*tenant in tail*], in trust for him and his assigns; with remainder to the use of the said [*tenant in tail*], his heirs and assigns, for ever. IN WITNESS, &c.]

45. DISENTAILING ASSURANCE PREVIOUS TO CONVEYANCE TO PURCHASER.

Habendum to uses to prevent dower.

(*f*) [If the tenant in tail is not entitled in possession, say here:—("subject to such particular estate or estates as is or are now subsisting therein anterior to the estate of the said [*tenant in tail*].")]

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46. [GRANT *at Common Law* (*a*) *by Tenant* IN TAIL IN REMAINDER, *with the* CONSENT *of the* PROTECTOR, *to* USES *to* PREVENT DOWER *in favour of a Purchaser.* (*To be inrolled*). *Variation where the* PROTECTOR DOES NOT JOIN, *and the Vendor* COVENANTS *to* PERFECT *the* TITLE HEREAFTER.

46. GRANT BY TENANT IN TAIL IN REMAINDER.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; [*protector*], of &c., of the second part; [*purchaser*], of &c., of the third part, and [*trustee*], of &c., of the fourth part; WHEREAS, by inden-

Parties.

Recital of set-

(*a*) The objection usually made to a remainder-man conveying by grant at common law, namely, that it imposes the necessity of proving the subsistence of the particular estate, does not apply where the owner of such estate joins in the character of protector. Vide ante, p. 205.

46. GRANT BY TENANT IN TAIL IN REMAINDER.

tlement creating entail.

tures of lease and release, bearing date respectively on or about the —— and —— days of ——, the release being made, &c., (being the settlement executed previously to the marriage of the said [*protector*] and [*wife*] his wife); the said [*settlor*] did convey and assure the hereditaments hereinafter described, and intended to be hereby granted, To the uses following (to take effect after the solemnization of the said then intended marriage), that is to say, To the use of the said [*protector*], during the term of his natural life, with remainder to the use of the said [*protector's wife*], during the term of her natural life, with remainder (subject to a limitation to trustees for preserving contingent remainders), To the use of the first son of the said [*protector*] on the body of the said [*wife*], his then intended wife, to be begotten, and the heirs of the body of such first son lawfully issuing, with such remainders over as are therein expressed (*b*). AND WHEREAS the said [*vendor*] is the first son of the said marriage and was baptized at ——.

—that grantor was the eldest son, &c.

AND WHEREAS the said [*vendor*] hath contracted with the said [*purchaser*] for the sale to him of the said hereditaments and the fee-simple thereof in remainder expectant upon the decease of the survivor of the said [*protector*] and [*wife*], his wife, free from all incumbrances (*c*):

Consent of protector.

[and the said [*protector*], as the protector of the hereinbefore-recited settlement, hath agreed to concur in these presents for the purpose of testifying his consent to the disposition hereby made (*d*)].

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the agreement aforesaid,

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(*b*) [If the protector does not consent to the disposition, and the vendor is entitled to the ultimate remainder in fee, recite the whole of the uses, and the events upon which his title depends. The subsequent variations are adapted to this state of things.]

Recital where protector does not consent.

(*c*) [If the protector does not consent, add—

"AND WHEREAS the said [*vendor*] being at present unable to procure the consent of the said [*protector*], as protector of the above-recited settlement, to the disposition or alienation of the hereditaments in fee-simple in remainder as aforesaid, the said [*purchaser*] hath consented to accept such conveyance or assurance as the said [*vendor*] can make without such consent, upon his entering into such covenant as is hereinafter contained for perfecting the title of the said [*purchaser*] at a future time."]

(*d*) [If the protector does not join, omit these words.]

46. GRANT BY TENANT IN TAIL IN REMAINDER.

and in consideration of the sum of £——, of lawful British money, by the said [*purchaser*] to the said [*vendor*] already paid, (the receipt, &c.), the said [*vendor*], [with the consent and approbation of the said [*protector*], as the protector of the hereinbefore-recited settlement, testified by his execution hereof], *Doth* by these presents grant and confirm unto the said [*purchaser*], and his heirs, ALL THAT (*parcels and general words*); And all the estate, right, title, interest, property, remainder, reversion, claim, and demand whatsoever, both at law and in equity, of him the said [*vendor*], in, to, of, and upon the said hereditaments and premises. To HAVE AND TO HOLD the said —— and hereditaments hereinbefore described, and all and singular other the premises hereby granted or otherwise assured, or intended so to be, from and immediately after the decease of the said [*protector*] and [*wife*], his wife, and of the survivor of them, unto the said [*purchaser*] and his heirs for ever, (free and absolutely discharged of and from all estates tail of the said [*vendor*] in the said hereditaments (*e*), and all estates, rights, titles, interests, and powers, to take effect after the determination or in defeazance of the same estates tail), To THE USES hereinafter expressed and declared concerning the same (that is to say) (*uses, ut ante, p.* 73 (*f*), *and covenants for title, ut ante, p.* 75, *omitting the covenant that the vendor is lawfully seised*). IN WITNESS, &c.]

Tenant in tail, with the consent of protector, grants,

Habendum.

To uses for preventing dower.

(*e*) [If the protector does not consent, say—

"(Free and absolutely discharged of and from all estates tail of the said [*vendor*] in the said hereditaments, but subject to the respective estates for life of the said [*protector*] and [*wife*], his wife, and the estates, rights, interests, and powers, to take effect after the determination or in defeazance of the said estate tail of him the said vendor [other than the said remainder in fee-simple so limited to him as aforesaid] or subject to such of the same estates, rights, interests, and powers as the said [*vendor*] is unable by these presents to bar, defeat, or destroy), To THE USES" &c.

Variation where protector does not consent.

(*f*) [The circumstance that the conveyance is made with the consent of a protector will not occasion any difference in the form of the covenants. As the protector's power of consenting cannot be controlled by any agreement, it is unnecessary to covenant against his acts.]

[If the protector does not give his consent, the covenants will be as follow:—

46. GRANT BY TENANT IN TAIL IN REMAINDER.

Covenants by vendor,

—that he is seised in tail, &c

—that the vendor hath power to convey,

—that premises shall remain to uses aforesaid,

—free from incumbrances.

And for further assurance.

AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*purchaser*], and his heirs, in manner following, (that is to say), that notwithstanding any act, deed, matter, or thing whatsoever, done, executed, or suffered by the said [*vendor*], to the contrary, he the said [*vendor*], now at the time of the sealing and delivery hereof, is lawfully and rightfully seised of the hereditaments and premises intended to be hereby granted and released, for an estate in tail in remainder expectant upon the decease of the survivor of the said [*protector*] and [*wife*], his wife, with such remainders over as aforesaid; *And also* that (notwithstanding any such act, deed, matter, or thing as aforesaid), he the said [*vendor*] now, at the time of the sealing and delivery of these presents, hath in himself full power and lawful and absolute authority to grant and assure the hereditaments and premises hereinbefore expressed to be hereby granted, unto the said [*purchaser*] and his heirs, to the uses and in manner aforesaid, according to the true intent and meaning of these presents. *And further*, that the said hereditaments and premises, &c., shall and lawfully may be peaceably and quietly had, held, and enjoyed, and the rents and profits thereof received and taken accordingly, without the interruption, disturbance, or denial whatsoever, of, from, or by the said [*vendor*], or any person or persons whomsoever, lawfully claiming by, through, from, or under him; *And that* free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by him the said [*vendor*], his heirs, executors, and administrators well and sufficiently saved harmless and kept indemnified of, from, and against all and all manner of former and other gifts, grants, rights, titles, charges, and incumbrances whatsoever, made, done, executed, or suffered by the said [*vendor*], or any other person or persons lawfully claiming by, from, through, under, or in trust for him; *And also*, that he the said [*vendor*], and every other person lawfully claiming by, from, or under the said [*vendor*], will and shall, at any time or times hereafter, at the request, costs, and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, execute, and perfect, or cause and procure to be made, done, executed, and perfected, all such further lawful acts, deeds, conveyances, and assurances in the law whatsoever, for the more effectually granting and assuring the said

46. GRANT BY TENANT IN TAIL IN REMAINDER.

hereditaments and premises, or any of them, or any part thereof, to, for, and upon the uses, trusts, intents, and purposes aforesaid, as by the said [*purchaser*], his appointees, heirs, or assigns, or any of them, or the counsel in the law of him, them, or any of them, shall be reasonably devised or advised and required; *And moreover*, that the said [*vendor*], or his issue in tail, will or shall, when he or they shall have power or ability so to do, at the request of the said [*purchaser*], his appointees, heirs, or assigns, but at the costs of the said [*vendor*], his executors, or administrators, make, do, execute, and perfect all such lawful acts, deeds, conveyances, and assurances in the law whatsoever, for effectually barring, discharging, and defeating all estates, rights, titles, interests, and powers to take effect after the determination or in defeazance of the estate tail of the said [*vendor*] in the said hereditaments and premises, and for perfecting and completing the title of the said [*purchaser*], his appointees, heirs, or assigns, to the said hereditaments and premises, and for assuring the same, and the inheritance thereof in fee-simple, either in possession or in remainder, immediately expectant on the decease of the said [*protector*] and [*wife*], his wife, as the case may be, to the uses aforesaid, or otherwise for the benefit of the said [*purchaser*], his appointees, heirs, or assigns for ever, as by the said [*purchaser*], his appointees, heirs, or assigns, or any of them, or the counsel in the law of him, them, or any of them, shall be reasonably devised or advised, and required."]

47. RELEASE BY HEIR IN TAIL TO PURCHASER.

47. [RELEASE *by an* HEIR IN TAIL (*after the death of the protector*) *to* PERFECT THE TITLE *of a* PURCHASER *from his ancestor* (*a*). (*To be inrolled.*) *Variation where the assurance is made in the lifetime and with the consent of the protector.*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*heir*], of &c., of the one part, and [*purchaser*], of &c., of the other part. WHEREAS, by indenture of grant, bearing date the —— day of ——, and made between &c., and duly inrolled on the —— day of ——, in the High Court of Chancery, after reciting (*state the recitals*), it is witnessed, (*state the operative part of the deed*), and by the now reciting indenture the said [*vendor*], for himself, his

Recitals of grant by tenant in tail;

As to barring entail by bargain and sale. Stamp on bargain and sale.

(*a*) [This assurance is founded on, and refers to, the assurance contained in the preceding precedent, as varied in the notes. The object might be more economically effected by a bargain and sale, if it were quite clear that the instrument would be exempt from the £5 stamp. In one sense it is certainly not "a bargain and sale of an estate of freehold" at all, and, even if treated as such, it may be said to come within the denomination of a "bargain and sale of an estate of freehold in lands *upon the sale thereof*." But, when we turn to the title CONVEYANCE in the schedule to the Stamp Act, we find that the additional duty is imposed on the "principal or only deed" of conveyance, with a direction that where lands are conveyed by "bargain and sale inrolled and also by lease and release, or feoffment," the release or feoffment shall be deemed the principal deed, "and the bargain and sale shall be charged only with the duty hereby imposed on *deeds in general*, (see DEED), but the same shall not be inrolled or be available unless also stamped for testifying the payment of the ad-valorem duty on the release or feoffment." There is then a provision for a conveyance "by lease and release and also by feoffment," but none for a conveyance "by grant and also by bargain and sale." And afterwards we find this clause: "And where there shall be several deeds, instruments, or writings for *completing the title* to the property sold, such of them as are not liable to the said ad-valorem duty shall be charged with the duty to which the same may be liable under any general *or particular description of such deeds, instruments, or writings contained in the schedule*." Although, on the whole, there seems to be strong ground for contending that the £5 stamp will not be payable, it will be prudent to avoid the question, either by impressing the stamp, or by adopting a release.]

47. RELEASE BY HEIR IN TAIL TO PURCHASER.

heirs, executors, and administrators, covenanted with the said [*purchaser*], his heirs and assigns, that (*recite the covenant to perfect the title*). AND WHEREAS the said [*vendor*] departed this life on the —— day of ——, and is buried at ——. AND WHEREAS the said [*heir*] is the eldest son of the said [*vendor*]. AND WHEREAS (*b*), the said [*protector*] departed this life on the —— day of ——, and is buried at ——. AND WHEREAS the said [*heir*] hath consented and agreed to perform the hereinbefore-recited covenant of the said [*vendor*], deceased, by executing such assurance as is hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance and performance of the said covenant and agreement, and in order to bar, defeat, and destroy all estates, rights, interests, and powers limited to take effect after or in defeazance of the base fee into which the said estate tail of the said [*vendor*] was converted by the effect of the above-recited indenture of the —— day of ——, and in order to perfect and complete the title of the said [*purchaser*], to the inheritance in fee-simple in possession of the said hereditaments and premises, the said [*heir*] (*c*), *Doth*, by these presents, (made &c., *ut ante*, *p.* 72), grant, release, and confirm, unto the said [*purchaser*], and his heirs, ALL the hereditaments and premises comprised in, or intended to be assured by, the above-recited indenture of the —— day of ——. And all the estate, right, title, and interest of the said [*heir*], in order to the said hereditaments and

Death of vendor.

Of heirship,

that heir has agreed to perfect the title.

Testatum:— In pursuance of deceased vendor's covenant,

heir conveys.

(*b*) [If the protector is alive, and concurs, in place of this recital, say:—

"AND WHEREAS at the request of the said [*purchaser*], the said [*protector*] hath consented that the title of the said [*purchaser*] shall be completed in manner hereinafter expressed, and the said [*heir*] hath consented," &c.]

Consent of protector.

[The protector is at liberty to take a pecuniary consideration for giving his consent; and where this is done a question may be raised, whether this transaction should not be stated, as subjecting the deed to an ad valorem stamp. It would, perhaps, be difficult to distinguish the case from that of a purchaser from an executor under a common-law authority, which is clearly within the provisions of the Stamp Act in respect of conveyances.]

Stamp where protector takes a consideration for his consent.

(*c*) "With the consent of the said [*protector*], as protector of the settlement whereby the said estate tail was created, (testified by his execution hereof)."

47. RELEASE BY HEIR IN TAIL TO PURCHASER.

premises, or any of them. To HAVE AND TO HOLD the said hereditaments and premises unto the said [*purchaser*] and his heirs, To THE USE of the said [*purchaser*], his heirs, and assigns, for ever (*d*). And the said [*heir*], for himself, his heirs, executors, and administrators, doth hereby covenant and declare with and to the said [*purchaser*], and his heirs, that he the said [*heir*] hath not at any time heretofore made, done, or permitted, or been party or privy to, any act, deed, matter, or thing whatever, whereby or by means whereof the said hereditaments and premises, or any of them, or any part thereof, are, is, can, shall, or may be charged, incumbered, aliened, or prejudicially affected. IN WITNESS, &c.]

Habendum.

Covenant by heir that he has not incumbered.

(*d*) [By the original conveyance the property was limited to uses to prevent dower,—uses which could not properly be declared upon a bargain and sale, which this assurance professes to be. But the effect of the present assurance is merely to enlarge the base fee which had been previously limited to uses, and it cannot alter or disturb those limitations.]

Effect of assurance to enlarge a base fee.

48. RELEASE OF COPYHOLDS BY EQUITABLE TENANT IN TAIL AND COVENANT TO SURRENDER.

48. RELEASE *in* FEE *by* EQUITABLE TENANT *in* TAIL *in Possession of* COPYHOLDS, *in whom the* LEGAL FEE-SIMPLE *is also* VESTED, *and Covenant to surrender to the Use of a Purchaser* (*a*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of &c., of the one part: and [*purchaser*],

Parties.

(*a*) By the statute 3 & 4 Will. 4, c. 74, *equitable* tenants in tail in copyholds are enabled to dispose of their lands by *surrender or by deed;* which deed, by the 53rd section must be such as would be adapted to their estate if it were of freehold tenure. Now, as an equitable tenant in tail of freeholds is required to convey by the same assurance as if his estate were legal, it follows that an equitable tenant in tail of copyholds electing to bar the entail by deed should convey by lease and release, or some other mode of assurance, adapted to convey a fee-simple in possession or remainder (as the case may be) in *freehold* lands. The present deed should be entered on the court-rolls, but need not be inrolled in Chancery. It will require a common deed stamp of 35*s.*, and a further stamp of the same amount in respect of the lease for a year. If the equitable tenant in tail had a remainder only, (especially if the prior tenant for life concurred in the character of protector), the deed might

Mode of assurance for barring equitable entails.

48. RELEASE OF COPYHOLDS BY EQUITABLE TENANT IN TAIL AND COVENANT TO SURRENDER.

of &c., of the other part. WHEREAS, by an indenture bearing date on or about the —— day of ——, made between [*vendor's father*], late of ——, of the first part; [*vendor's mother, by maiden name*], afterwards the wife of the said [*father*], of the second part; and [*trustees*], of &c., of the third part, (being the settlement executed previously to the marriage of the said [*father*] and [*mother*], his late wife deceased); the said [*father*], (being seised of the copyhold hereditaments hereinafter described, according to the custom of the manor of ——, for an absolute estate of inheritance in fee-simple in possession), in consideration of the marriage then intended (and which was shortly afterwards solemnized) between him and the said [*mother, by maiden name*], covenanted with the said [*trustees*] and their heirs to surrender into the hands of the lord of the said manor of ——, all the same copyhold hereditaments with the appurtenances, to the uses following, that is to say, *To the use* of the said [*father*] during the term of his natural life, and, after his decease, *To the use* of the said [*mother*], the then intended wife of the said [*father*], during the term of her natural life, and, after her decease, *To the use* of all and every the child and children of the said then intended marriage, and the heirs of his, her, and their body and respective bodies lawfully issuing, if more than one, as tenants in common, with such remainders over as are therein expressed. AND WHEREAS the said [*vendor*] is the only child of the said marriage, and is the eldest son and customary heir of the said [*father*]. AND WHEREAS the said [*father*] and [*mother*] have both departed this life. AND WHEREAS the said [*father*] did not in his lifetime surrender the said copyhold —— and hereditaments to the uses mentioned in the hereinbefore-recited indenture, pursuant to his covenant therein contained. AND WHEREAS the said [*vendor*] hath contracted with the said [*purchaser*] for the absolute sale to him of the said copyhold hereditaments for an unincumbered estate in fee-simple in possession, ac-

Recital of marriage settlement creating equitable entail.

That releasor was the only child of the marriage, &c.

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properly assume the form of a grant of a remainder at common law, as in the precedent, ante, p. 293.

Where the equitable entail is in a married woman, who joins with her husband in barring it *by surrender*, she is (by the 90th section) to be separately examined as in the case of a surrender of a legal estate; but where they bar it *by deed*, an acknowledgment is necessary, as in the case of a conveyance of freeholds by a married woman.

48. RELEASE OF COPYHOLDS BY EQUITABLE TENANT IN TAIL AND COVENANT TO SURRENDER.

cording to the custom of the said manor, at or for the price or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— by the said [*purchaser*] to the said [*vendor*] in hand paid at the time of executing these presents, (the receipt &c.), the said [*vendor*] *Doth* by these presents, made &c., (*ut ante, p.* 72), grant, bargain, sell, and release unto the said [*purchaser*] and his heirs, ALL, &c. (*parcels*), with their and every of their actual and reputed appurtenances; And all the estate, right, title, interest, property, possession, benefit, claim, and demand, whatsoever, both at law and in equity, of the said [*vendor*], in, to, and upon the said —— hereditaments and premises. TO HOLD the said —— hereditaments and premises hereinbefore described, and all and singular other the premises hereby released or otherwise assured or intended so to be, (free and absolutely discharged of and from all estates tail of the said [*vendor*] in the same hereditaments, and all estates, rights, titles, interests, and powers, to take effect after the determination or in defeazance of the same estates tail), unto the said [*purchaser*] and his heirs for ever; TO THE USE of the said [*purchaser*], his heirs and assigns, for ever. AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said agreement, and for the considerations aforesaid, he the said [*vendor*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said [*purchaser*], his heirs and assigns, (*to surrender the said copyhold hereditaments and premises, and for title, &c., ut ante, p.* 191, *omitting the covenant that vendor is lawfully seised.*) IN WITNESS, &c.

Testatum.

Tenant in tail conveys to releasee,

Parcels.

All the estate, &c.

Habendum.

To the use of purchaser in fee.

49. [ASSIGNMENT OF LEASEHOLDS, *directed to be* SOLD, (*the* PRODUCE *to be laid out in the Purchase of* FREEHOLD LANDS, *to be* SETTLED); *by the Trustee and the* TENANT FOR LIFE *and* TENANT IN TAIL *under the Trusts.* (*To be inrolled*).

49. BY TRUSTEES AND TENANTS FOR LIFE AND IN TAIL; LEASEHOLDS DIRECTED TO BE SOLD AND SETTLED.

THIS INDENTURE, made the —— day of ——, BETWEEN [*trustees*], of &c., of the first part; [*tenant for life*], of &c., of the second part; [*tenant in tail*], of &c., of the third part, and [*purchaser*], of &c., of the fourth part. WHEREAS [*recite lease and title of settlor*]. AND WHEREAS the said [*settlor*], by his last will, bearing date the —— day of ——, gave and devised all his freehold hereditaments to the use of his son the said [*tenant for life*], during his life, with remainder to the use of trustees to preserve the subsequent contingent remainders, with remainder to the use of the first son of the said [*tenant for life*], and the heirs male of his body, with remainders over. And the said testator gave and bequeathed all his leasehold estates, and all the residue of his personal estate and effects whatsoever, (after payment of certain specific pecuniary legacies), unto the said [*trustees*], their executors, administrators, and assigns, upon trust, as soon as conveniently might be, to sell and convert into money such parts thereof as should not consist of ready money, and to lay out and invest the produce of his said leasehold and personal estate and effects, in the purchase of freehold lands and hereditaments, to be settled to the uses thereinbefore expressed concerning his freehold hereditaments. AND WHEREAS the said testator departed this life without revoking or altering his said will, which was duly proved on the —— day of ——, in the —— Court of ——, by the said [*trustees*], being the executors therein named. AND WHEREAS the said [*tenant in tail*], is the first son of the said [*tenant for life*]. AND WHEREAS the said leasehold hereditaments were not sold by the said [*trustees*] in pursuance of the trusts aforesaid. AND WHEREAS the said [*tenant for life*] and [*tenant in tail*] have contracted with the said [*purchaser*] for the absolute sale to him of the said leasehold hereditaments for the residue of the said term of —— years, at the price of

Parties.

Recitals.

Will.

Death of settlor.

Probate.

Leaseholds not sold.

Contract for purchase.

49. BY TRUSTEES AND TENANTS FOR LIFE AND IN TAIL; LEASEHOLDS DIRECTED TO BE SOLD AND SETTLED.

£——, £——, part thereof, being the consideration-money to be paid to the said [*tenant for life*] for the purchase of his life interest therein and in the produce thereof, and £——, residue of the said sum of £——, being the consideration-money to be paid to the said [*tenant in tail*] for the purchase of his interest in remainder therein and in the produce thereof.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of £—— sterling, by the said [*purchaser*] to the said [*tenant for life*] already paid, and of £—— sterling by the said [*purchaser*] to the said [*tenant in tail*] already paid, making together the said gross purchase-money or consideration of £——, and also in consideration of 10*s.* by the said [*purchaser*] to the said [*trustees*] already paid, (the several receipts of which sums of £——, £——, and 10*s.* are hereby acknowledged),

In consideration of purchase-monies.

Trustees and vendors assign leaseholds.

The said [*trustees*], with the consent and by the direction of the said [*tenant for life*] and [*tenant in tail*], Do, and each of them Doth, by these presents, grant, assign, and transfer unto the said [*purchaser*], his executors, administrators, and assigns, All and singular the hereditaments and premises hereinbefore described, and all and singular other the hereditaments and premises (if any) comprised in and demised by the above-recited indenture of lease, and all and singular the rights, members, and appurtenances, to the said hereditaments and premises, or any part thereof, now or heretofore in fact or reputation belonging, together with the said indenture of lease, and the whole force, benefit, and effect thereof, and all the estate, right, title, interest, benefit, claim, and demand whatsoever, both at law and in equity, of them the said [*trustees*], [*tenant for life*], and [*tenant in tail*],

Habendum.

respectively, in, to, of, and upon the same hereditaments and premises, or any part thereof: To have and to hold the said hereditaments and premises unto the said [*purchaser*] his executors, administrators, and assigns, for all the residue and remainder now to come and unexpired of the said term of —— years, granted by the said indenture of lease, and for all other the estate, term, and interest, late of the said [*settlor*], deceased, and now of them the [*trustees*], [*tenant for life*], and [*tenant in tail*], respectively, in the said hereditaments and premises, or any part thereof,

Free from trusts.

free and absolutely and for ever discharged from the said estates for life and in tail respectively, and all estates, rights, interests, and powers to take effect after the determination or in defeazance of such estate tail, and all other the trusts of the hereinbe-

49. BY TRUSTEES AND TENANTS FOR LIFE AND IN TAIL; LEASEHOLDS DIRECTED TO BE SOLD AND SETTLED.

fore-recited will, and for the sole and absolute use and benefit of him the said [*purchaser*], but subject nevertheless to the rent, and the observance and performance of the covenants, conditions, and agreements, reserved and contained by and in the said indenture of lease, and which, on the part of the tenant, ought henceforth to be respectively paid, observed, and performed. (*Covenant by trustees that they have not incumbered*). And the said [*tenant for life*], for himself, his heirs, executors, and administrators, and for and against the acts and defaults of himself, his heirs, executors, and administrators, and all persons claiming by, through, under, or in trust for him, them, or any of them, and also for and against the acts and defaults of the said [*settlor*], deceased, and all persons claiming by, through, under, or in trust for him, so far as such last-mentioned acts and defaults may concern the estate, title, quiet enjoyment, freedom from incumbrances, or further assurance of the said hereditaments and premises, during the —— years (*a*) of the said term next ensuing the date hereof, and the said [*tenant in tail*], for himself, his heirs, executors, and administrators, and for and against the acts and defaults of himself, his heirs, executors, and administrators, and all persons claiming by, through, under, or in trust for him, them, or any of them, and also for and against the acts and defaults of the said [*settlor*], deceased, and all persons claiming by, through, under, or in trust for him, so far as such last-mentioned acts and defaults may concern the estate, title, quiet enjoyment, freedom from incumbrances, and further assurance of the said hereditaments and premises during the last —— years of the said term of —— years; Do respectively hereby covenant and agree with the said [*purchaser*], his executors, administra-

Covenants for title by tenant for life and remainderman.

(*a*) [I. e., a number of years bearing the same proportion to the total residue of the term, as the purchase-money paid to the tenant for life bears to the total purchase-money. This seems to be the proper mode of qualifying the covenants of a tenant for life and remainderman, in respect of a perishable fund directed to be converted into a permanent one. For the form of the covenants by a tenant for life and remainderman of an unconverted leasehold estate, vide infra, p. 332. It is very usual to see the covenants for title, &c., of a part owner confined not only to the acts and defaults of himself and those claiming under him, but also to the title, enjoyment, &c., of his own particular share; but the latter qualification is evidently superfluous where the covenantor does not make himself answerable for the acts and defaults of the person or persons through whom he derives title.]

As to the form of covenants for title, &c., by tenant for life and remainderman of a converted perishable fund.

49. BY TRUSTEES AND TENANTS FOR LIFE AND IN TAIL; LEASEHOLDS DIRECTED TO BE SOLD AND SETTLED.

tors, and assigns, in manner following, (that is to say), THAT, notwithstanding any act or default by the said [*tenant for life*] and [*tenant in tail*], or by either of them, or by the said [*settlor*], deceased, or by any person or persons claiming by, through, under, or in trust for them or any of them, made, done, permitted, or suffered to the contrary, the said indenture of lease, of the —— day of ——, is a good and sufficient lease, valid and effectual in the law, of the said hereditaments and premises expressed to be hereby assured, and is not forfeited, surrendered, or in anywise rendered void or voidable: AND also, that, notwithstanding any such act or default as aforesaid, the said [*trustees*], [*tenant for life*], and [*tenant in tail*], or some of them, now have or hath in themselves or himself good right, &c., (*to assign, for quiet enjoyment, and further assurance, ut ante, p.* 169. *Add covenant to pay rent and perform covenants in lease, ut ante, p.* 171, *if necessary. Vide ante, p.* 172. *n.*) IN WITNESS &c.]

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50. ASSIGNMENT OF ENTAILED MONEY WITH CONSENT OF PROTECTOR.

50. [ASSIGNMENT *of a* REVERSIONARY INTEREST *in a* PERSONAL FUND; *adapted to the Case of a Sale by* TENANT IN TAIL *in Remainder, (with the* CONSENT *of the* PROTECTOR), *of* PERSONAL ESTATE *directed to be* LAID OUT *in* LAND (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; [*protector*], of &c., of the second part; and [*purchaser*], of &c., of the third part.

Recital of will creating entail;

WHEREAS [*testator*], late of &c., in and by his last will and testament in writing, bearing date on or about the —— day of ——, after bequeathing certain specific and pecuniary legacies, gave all the residue of his personal estate unto [*executors*], of &c., their executors or administrators, Upon trust to lay out and invest the same in the purchase of freehold lands of inheritance, and which the said testator directed should be conveyed *To the use* of his nephew the said [*protector*], during his life; And after his decease, *To the use* of

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(*a*) [This precedent may be adapted, by variations too obvious to require to be particularly indicated, to the case of a sale of a reversionary interest in a fund of personalty not directed to be laid out in the purchase of lands to be entailed. See a form of a mortgage of such an interest, ante, Vol. 6, p. 260.]

50. ASSIGNMENT OF ENTAILED MONEY WITH CONSENT OF PROTECTOR.

the first and every other son of the said [*protector*] successively in tail male, with such remainders over as in the said will are expressed; And the said [*testator*] directed, that, until the said personal estate should be laid out pursuant to the said trust, the same should be invested in the names of the said executors in government or real securities, the dividends or interest whereof should from time to time be paid to the persons who would have been entitled to the rents and profits of the freehold hereditaments to be purchased as aforesaid, if the same had been so purchased. AND WHEREAS the said testator departed this life on the —— day of ——, and his said will was shortly afterwards proved by the said executors therein named in the Prerogative Court of the Archbishop of Canterbury. AND WHEREAS the said [*vendor*] is the first son of the said [*protector*], and was baptized at ——, on the —— day of ——. AND WHEREAS the residue of the personal estate of the said [*testator*], after payment and satisfaction thereout of his debts and funeral and testamentary expenses, and the legacies bequeathed by his said will, amounted to the clear sum of 3550*l.*, whereof the sum of 1500*l.* consisted of a mortgage debt for the said sum and interest, secured by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, made between [*mortgagor*], of &c., of the one part; and the said [*testator*] of the other part; and the sum of 2000*l.*, the residue of the said sum of 3550*l.*, was invested by the said [*executors*] in the purchase of 2360*l.* Three Pounds per centum Reduced Annuities, which are now standing in their names in the books of the Governor and Company of the Bank of England, no part of the said residuary personal estate having been laid out by the said executors in the purchase of lands or other freehold hereditaments, pursuant to the trusts and directions of the hereinbefore-recited will. AND WHEREAS the said [*vendor*] hath contracted with the said [*purchaser*] for the sale to him of the absolute beneficial interest in the said trust funds, subject to the life interest of the said [*protector*], but otherwise free from the aforesaid trusts for investment and settlement, at or for the price or sum of £——; and the said [*protector*], as the protector of the entail created by the hereinbefore-recited will, hath consented to join in the disposition intended to be hereby made.

—death of testator.

—that vendor is tenant in tail.

—that personalty had not been laid out in land.

—of contract for sale.

NOW THIS INDENTURE WITNESSETH, that, in pur- Testatum.

50. ASSIGNMENT OF ENTAILED MONEY WITH CONSENT OF PROTECTOR.

Vendor, with consent of protector, assigns.

suance of the said agreement, and in consideration of the sum of £—— sterling, paid by the said [*purchaser*], to the said [*vendor*] at or immediately before the execution of these presents, the receipt whereof is hereby acknowledged, he the said [*vendor*], with the consent and approbation of the said [*protector*] testified by his execution hereof, DOTH by these presents assign, transfer, and set over unto the said [*purchaser*], his executors, administrators, and assigns, ALL AND SINGULAR (*b*) the said principal sum of 1500*l.*, secured by the

Personal estate bequeathed by the will.

hereinbefore-mentioned indentures of lease and release or mortgage, and also the said sum of 2360*l.* Three Pounds per centum Reduced Annuities, and all other the residuary personal estate bequeathed in or by the hereinbefore-recited will, and the stocks, funds, and securities on which any part of the said personal estate already hath been or at any time or times hereafter shall be laid out or invested, and the dividends, interest, and annual produce henceforth to arise therefrom, subject, nevertheless, and without prejudice to the life interest of the [*protector*] in the said trust monies, stocks, funds, and securities; And all the right, title, interest, benefit, claim, and demand, whatsoever of him the said [*vendor*] in, to, and upon the said trust monies, securities, and premises. TO HAVE, RECEIVE, AND TAKE the said trust monies, stocks, funds, and securities, and other the premises hereby assigned or intended so to be (free and absolutely discharged of and from the aforesaid trust for investment and settlement, and of and from all estates tail of the said [*vendor*], and all estates, rights, titles, interests, and powers, to take effect after the determination or in defeazance of the same estates tail, but subject and without prejudice as aforesaid), unto the said [*purchaser*], his executors, administrators, and assigns, as and for his and their own proper monies, and estate for ever, to his and their own proper use and benefit (*c*): AND it is hereby agreed and declared between and by the said parties hereto, that the said trust funds and premises shall and may from time to time henceforth be and be deemed to be of the nature and quality of personal estate, to and for all intents and

And all the right, &c.

Habendum to purchaser absolutely.

(*b*) A specification of the funds clearly is not essential, and, indeed, would be impracticable where the state of the funds is not known to the assignor.

(*c*) [A power of attorney may be added, but it would be quite superfluous. Vide ante, Vol. 5, p. 297; Vol. 6, p. 140.]

purposes whatsoever, any rule of equity to the contrary notwithstanding; And that the same or any part thereof shall not be laid out by the said [*executors*] in the purchase of lands or hereditaments, as directed by the hereinbefore-recited will (*d*). And the said [*vendor*], for himself, his heirs, executors, administrators, and assigns, and for and against the acts and defaults only of himself and of the said [*testator*], deceased, and of either of them, and of any person or persons claiming by, through, under, or in trust for them, or either of them, doth hereby covenant with the said [*purchaser*], his executors, administrators, and assigns, that the said [*vendor*] has now full power by these presents to assign and transfer the trust monies, stocks, and funds, securities, and premises, subject only to the said life interest therein of the said [*protector*], in manner aforesaid, according to the true intent and meaning of these presents: And also, the said [*vendor*] will not nor shall his executors or administrators at any time hereafter release or discharge the said trust monies, stocks, funds, securities, and premises, or the interest, dividends, or annual produce thereof, or any of them, or any part thereof respectively, but that the same shall and may immediately upon and from and after the de-

50. ASSIGNMENT OF ENTAILED MONEY WITH CONSENT OF PROTECTOR.

Declaration that the assigned funds shall be deemed to be personal estate.

Covenants for title, &c.

(*d*) Where a tenant in tail in remainder, with the consent of the protector, assigns a fund of this nature, either to a trustee for himself, for the purpose of acquiring the absolute reversionary interest therein, or to a purchaser, the effect of the assignment is merely to destroy the entail and remainders, leaving the fund still impressed with the qualities of real estate, and liable to be invested in due course for the benefit of the respective cestuis que trust. The trustees, however, ought to have notice of the assignment, as well for the purpose of completing the purchaser's title, as in order that their conveyances of lands, purchased under the trust, may be framed accordingly, i. e., that a remainder in fee-simple may be limited to the purchaser, instead of a remainder in tail to the present assignor. It is, however, in the power of *all* the parties beneficially concerned in interest to elect to take the fund in its actual state; and an intimation of such their intention to the trustees would preclude the latter from proceeding in their trust to invest in purchases of land. Even where the parties do not concur in any such intimation, the tenant in tail, or the purchaser, (as the case may be), ought to declare what is to be the quality of the fund, as between his own representatives, or rather ought to insert such a declaration, if its present constructive character as real estate is to be changed. This would regulate the nature of the property for the purpose of transmission, until the fund should be actually laid out, but, it is conceived, *no longer*, for it would not prevent the land, *when purchased*, from devolving to the real representatives.

As to declaring the fund to be personal estate.

50. ASSIGNMENT OF ENTAILED MONEY WITH CONSENT OF PROTECTOR.

cease of the said [*protector*], be received and enjoyed by the said [*purchaser*], his executors, administrators, or assigns, free from all incumbrances whatsoever, according to the true intent and meaning of these presents. AND FURTHER, that the said [*vendor*], his executors and administrators, and all other persons claiming any right, title, charge, or interest, in or to the said trust monies, stocks, funds, securities, and premises, or any of them, or any part thereof respectively, (other than and except the said [*protector*] and his assigns, in respect of his aforesaid life interest therein), will and shall from time to time, and at all times hereafter, upon every reasonable request, and at the costs of the said [*purchaser*], his executors, administrators, or assigns, perfect every such lawful act, deed, assignment, or assurance, in the law whatsoever, for more effectually assigning, appointing, or otherwise assuring the said trust monies, stocks, funds, securities, and premises, (subject as aforesaid), unto the said [*purchaser*], his executors, administrators, or assigns, for his and their use and benefit, and for better enabling him or them to recover and receive the same, as by the said [*purchaser*], his executors, administrators, or assigns, or his or their counsel, shall be advised and required. IN WITNESS &c.]

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51. ASSIGNMENT OF AGREEMENT FOR A LEASE.

51. ASSIGNMENT *of the* BENEFIT *of an* AGREEMENT *for a* LEASE (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of

As to assigning agreement for a lease.

(*a*) As to whether the benefit of an agreement for a lease is assignable, or, in other words, whether the assignee of such an agreement can enforce specific performance of it against the lessor in a Court of equity, see observations, ante, Vol. 4, p. 295. Of course, a formal assignment is not necessary for this purpose. An agreement in writing would be sufficient; but, to enable either party to maintain an action of covenant, it should be *under seal*. It might be shortly expressed by indorsement, thus:—

SHORT PRECEDENT OF INDORSED AGREEMENT.

"AGREED this —— day of ——, BETWEEN the within-named [*vendor*], of the one part; and [*purchaser*], of &c., of the other part; In consideration of 20*l.* this day paid by the said [*purchaser*] to the said [*vendor*], the receipt whereof the said [*vendor*] hereby acknowledges, the said [*vendor*]

51. ASSIGNMENT OF AGREEMENT FOR A LEASE.

&c., of the other part: WHEREAS, by articles of agreement, bearing date on or about the —— day of ——, and made between [A. B.] of the one part; and the said [*vendor*], of the other part; the said [A. B.] in consideration of the covenants and conditions thereinafter contained, agreed to let unto the said [*vendor*], ALL THAT (*parcels*). And the said [*vendor*] did thereby, for himself, his executors, administrators, and assigns, agree to erect on the said piece of ground two good substantial brick-built dwelling-houses of the third rate or class of buildings, of an uniform elevation, conformably in every respect to a certain drawing or plan mentioned to have been then exhibited to him for that purpose (*b*), the said

Recital of agreement to grant a building lease.

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hereby absolutely sells to the said [*purchaser*] the benefit of the within-written agreement, and of all covenants and stipulations therein entered into with the said [*vendor*], and of all the remedies to be taken or pursued by virtue thereof, and agrees, at the expense of the said [*purchaser*], to do all necessary acts for causing the within-named [*lessor*] to grant to the said [*purchaser*] the lease within contracted to be granted to the said [*vendor*]. AND the said [*purchaser*], in consideration of the premises, for himself, his heirs, executors, and administrators, hereby agrees with the said [*vendor*] to perform all the covenants and stipulations on the part of the said [*vendor*] contained in the said agreement, and to indemnify him from all actions, suits, damages, and expenses, by reason of his the said [*purchaser's*] non-performance thereof. IN WITNESS, &c."

Separate plan may be referred to.

(*b*) It is clear, that, if an agreement refer to a plan as detailing the particular mode in which a building contract is to be executed, parol evidence is admissible to shew the identity of the plan. *Hodges* v. *Horsfall*, 1 Rus. & M. 116; ante, Vol. 1, p. 376. See, also, *Clinan* v. *Cooke*, 1 Sch. & Lef. 32; *Blagden* v. *Bradbear*, 12 Ves. 471; *Ex parte Arkwright*, 3 Mon. D. & De G. 129. But the evidence must be such as to leave no doubt of the identity of the paper to which the reference is made; and, in the first of the cases above cited, Lord *Lyndhurst* dismissed a bill for the specific performance of an agreement to grant a lease of "All those premises at B., in the occupation of Y., known by the sign of the M. public-house, with the additions intended to be made thereto by H. (the intended lessee), *as per plan*, for 31 years," &c., because the evidence failed to shew which of several plans was the one intended. In order to avoid questions of this nature, the plan should be signed by the parties, and annexed to the contract; or, which would be still better, should be indorsed on the contract. [And the stamp for length should be sufficient to include all the words and figures

Progressive stamp.

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houses to be built in a workman-like manner, with good and substantial materials of every kind, to the approbation of the surveyor for the time being of the said [A. B.]; and to be covered in within four calendar months from the day of executing the now being recited agreement; and that the said [*vendor*], his executors, administrators, or assigns, would or should immediately insure the said houses in the —— fire office to the full value thereof. And the said [A. B.] did thereby for himself, his executors or administrators, agree, when the said houses should be covered in, to grant a lease unto the said [*vendor*] of the ground before described for the term of —— years from Lady-day then last, the said [*vendor*] paying therefore yearly during the term of the lease thereby agreed to be granted the sum of £——, by quarterly payments, the first payment to commence at Michaelmas-day then next, without deduction by reason of taxes or otherwise howsoever; and which lease was to be prepared by the solicitor of the said [A. B.], at the sole expense of the said [*vendor*], and to contain all the customary clauses, provisoes, conditions, and restrictions, usually inserted in leases granted by the said [A. B.] to his undertenants. AND WHEREAS the two dwelling-houses so agreed to be built by the said [*vendor*] have been partly erected by him, but are not yet covered in. AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the purchase of all such benefit and advantage as he the said [*vendor*] hath or may have by virtue of the above-recited articles of agreement in the premises thereby agreed to be leased as aforesaid, at the price or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of the sum of £—— sterling paid to the said [*vendor*] by the said [*purchaser*] immediately before the execution of these presents, the receipt of which sum in full for such purchase-money as aforesaid the said [*vendor*] doth hereby acknowledge, and from the same doth for ever absolutely discharge the said [*purchaser*], his executors, administrators, and assigns; He the said [*vendor*] *Doth*, by these presents, bargain, sell, assign, transfer, and set over unto the said [*purchaser*],

—that houses remain unfinished.

—of agreement to grant a building lease.

Testatum.

In consideration of purchase-money, vendor assigns to purchaser the benefit of the agreement.

in the plan. Vide ante, Vol. 1, p. 726. But it is otherwise if the plan is not annexed, but only referred to. *Sneezum* v. *Marshall*, 7 Mee. & W. 417.]

[As to the conclusiveness of the description in a plan, and the effect of a discrepancy as to quantity between it and the descriptive words in the deed, see *Llewellyn* v. *Jersey*, 11 Mee. & W. 183.]

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his executors, administrators, and assigns, the above-recited articles of agreement of the —— day of ——, and all the right, title, trust, interest, property, possession, benefit, claim, and demand, whatsoever, at law and in equity, which he the said [*vendor*] now hath or may have by virtue of the said articles of agreement, and the covenants, stipulations, and agreements, contained on the part of the said [A. B.], in, to, of, or upon the premises described in the said articles of agreement, and so thereby agreed to be leased as hereinbefore is mentioned, with the appurtenances; *And also* all and singular the covenants, stipulations, and agreements, in the said articles of agreement contained, on the part of the said [A. B.], his heirs, executors, or administrators, to be performed; Habendum. *And all* benefit and advantage which the said [*vendor*], his executors or administrators, might or could have had by virtue thereof, if these presents had never been made: To HAVE AND TO HOLD the said articles of agreement, and all other the premises hereinbefore assigned, or expressed so to be, unto the said [*purchaser*], his executors, administrators, and assigns, for his and their absolute benefit, in as full, ample, and beneficial a manner as the said [*vendor*] might or could have held and enjoyed the same premises, if these presents had not been made; subject, nevertheless, to the observance and performance by and on the part of the said [*purchaser*], his executors, administrators, and assigns, of the several covenants, stipulations, and agreements, in the aforesaid articles of agreement contained, on the part of the said [*vendor*], his executors or administrators, to be performed, or such of the covenants, agreements, and stipulations, as are now unperformed or capable of taking effect (*c*).

(*c*) Some persons add a power of attorney by the vendor to the purchaser; such a power is only necessary to enable the purchaser to sue on the agreement *at law*, where he must use the name of the vendor. If it be thought advisable to insert a power for this purpose, it may be shortly expressed as follows:—

Power of attorney to sue on agreement.

"AND the said [*vendor*] doth hereby absolutely and irrevocably constitute and appoint the said [*purchaser*], his executors and administrators, the true and lawful attorney and attornies of him the said [*vendor*], for him and in his name, or otherwise, but at the sole risk and costs, and for the benefit of the said [*purchaser*], his executors or administrators, to demand from the said [A. B.], and all other persons whom it may concern, the lease agreed to be granted in and

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AND the said [*vendor*] doth for himself, his heirs, executors, and administrators, covenant with the said [*purchaser*], his executors, administrators, and assigns, by these presents, in manner following, that is to say, that he the said [*vendor*] hath not at any time heretofore made, done, executed, or knowingly suffered any act, deed, matter, or thing whatsoever, by means whereof he is prevented from effectually assigning the aforesaid articles of agreement and premises, in manner aforesaid, and according to the true intent and meaning of these presents; *And also* that he the said [*vendor*], his executors or administrators, will or shall, on the request, and at the costs of the said [*purchaser*], his executors, administrators, or assigns, use his and their best endeavours to induce and procure the said [A. B.] to grant a lease of the said piece or parcel of ground to the said [*purchaser*], his executors, administrators, or assigns (*d*): AND

Covenant to vendor that he has done no act to prevent his assigning the agreement;

and to use his best endeavours to procure lease to be granted to purchaser.

Covenant by

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by the hereinbefore-recited agreement as aforesaid; And to bring or institute any action, suit, or other proceeding, at law or in equity, by virtue of the said agreement, as by the said [*purchaser*], his executors or administrators, shall be deemed expedient; And for all or any of the purposes aforesaid so appoint a substitute or substitutes, and such substitution, from time to time, at pleasure to revoke."

* Agreement that vendor shall take the lease if required.

(*d*) As there is doubt whether a person having an agreement for a lease can insist upon its being granted to his nominee, sometimes a clause is inserted in an assignment of such an agreement, obliging the vendor to take a grant of the lease to himself, if required by the lessor so to do, and assign it over to him as follows:—

"And that in case the said [A. B.] shall refuse or decline to grant to the said [*purchaser*], his executors or administrators, the lease agreed to be granted by him to the said [*vendor*] as aforesaid, but shall require the same to be accepted and taken by the said [*vendor*], his executors or administrators, then that the said vendor, his executors or administrators, will or shall accept and take such lease accordingly, and will or shall immediately thereupon, on the request, and at the costs, of the said [*purchaser*], his executors, administrators, or assigns, effectually assign the same, and the said piece or parcel of ground and premises therein to be comprised, unto the said [*purchaser*], his executors, administrators, or assigns, for his and their own proper use and benefit, for all the estate, term, and interest, so to be granted to the said [*vendor*], his executors, administrators, or assigns

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the said [*purchaser*] doth hereby, for himself, his heirs, executors, and administrators, covenant with the said [*ven-*

purchaser to

therein as aforesaid, upon condition, nevertheless, and provided, that he the said [*purchaser*], his executors or administrators, shall pay to the said [*vendor*], his executors or administrators, the costs and expenses which he or they shall have incurred in obtaining such lease and the counterpart thereof, and shall, at the costs of the said [*purchaser*], his executors or administrators, execute and deliver to the said [*vendor*], his executors or administrators, a bond or covenant indemnifying him and them from all damages, costs, and expenses, by reason of the covenants which shall have been entered into by the said [*vendor*], his executors or administrators, in such lease so taken by him or them as aforesaid."

The insertion of clauses of this nature must not be considered as of course, for a vendor would generally object, under such circumstances, to subject himself to the rent and covenants of the lease, and take the purchaser's personal indemnity against those covenants. Another mode sometimes resorted to for effecting the object is, to authorize the purchaser to accept a lease and execute the counterpart in the name of the vendor. It should be observed that, as the only ground for these expedients is the doubt whether the performance of the contract could be enforced by a nominee of the intended lessee, if the agreement be express upon this point (*as it always ought to be*), the clauses in question are quite unnecessary. Indeed, it is conceived, that the better opinion is, that, even if assigns or nominees were not mentioned in the agreement, the lessor would be bound to grant the lease to the nominee of his intended lessee, unless he could shew that his security was likely to be diminished by the substitution of such nominee for the party with whom he had contracted. A question of a similar nature would arise on a sub-contract for sale entered into by the purchaser of leaseholds before he had obtained his assignment, namely—whether the vendor was bound to make the assignment to, and accept the covenants of, indemnity of the sub-purchaser against the rent and covenants of the lease. According to the above suggestion, he would be bound, unless he could prove the individual proposed to be objectionable. If a power of attorney, ut supra, is given, the following addition should be made to the covenant:—

Not to revoke power.

"And also that the said [*vendor*] will not, nor shall his executors or administrators, at any time hereafter, without the consent in writing of the said [*purchaser*], his executors or administrators, revoke the power or authority hereinbefore contained, or become nonsuit in, or otherwise interfere with, any action, suit, or other proceeding, which shall or may be brought or instituted by the said [*purchaser*], his executors,

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dor], his executors and administrators, that he the said [*purchaser*], his executors, administrators, or assigns, will or shall, from henceforth, perform and fulfil all the covenants and stipulations in the above-recited articles of agreement expressed, on the part of the said [*vendor*], his executors, administrators, and assigns, to be performed and fulfilled, or such of the said covenants and stipulations as now remain subsisting, unperformed, or capable of taking effect; And will or shall at all times hereafter effectually keep harmless and indemnified the said [*vendor*], his heirs, executors, and administrators, of, from, and against the same covenants, stipulations, and agreements, and all actions, suits, costs, charges, damages, expenses, claims, and demands whatsoever, for or in respect of the same covenants, stipulations, and agreements, or otherwise in relation thereto (*e*). IN WITNESS, &c.

perform the stipulations of the contract.

—and indemnify the vendor in respect thereof.

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or administrators, or his or their substitute or substitutes, by virtue thereof."

(*e*) Add, if a power of attorney is given—

"And also for or in respect of the power or authority hereinbefore given to the said [*purchaser*], his executors or administrators, or any actions, suits, or other proceedings, at law or in equity, which may be brought or instituted by the said [*purchaser*], his executors or administrators, or his or their substitute or substitutes, by virtue thereof, or otherwise in relation thereto."

And also in respect of the power.

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52. ASSIGNMENT OF GROUND-RENT BY DEMISE OF REVERSION.

52. [ASSIGNMENT OF GROUND-RENTS *by the* REVERSIONER IN FEE (*a Corporation*) *with a* DEMISE *for vesting in the Purchaser a* REVERSION *to enable him to recover them.*

Parties.

THIS INDENTURE, made &c., BETWEEN the company of proprietors of ——, of the one part; and [*purchaser*], of the other part:

Recitals.

WHEREAS (*recite lease and any subsequent change of ownership of the reversion*); AND WHEREAS the said company of proprietors have contracted with the said [*purchaser*], for the sale to him of a well-secured ground-rent of 15*l.* per annum for the unexpired term of forty-nine years, from Lady-day last, being the rent reserved by the above-recited inden-

52. ASSIGNMENT OF GROUND-RENT BY DEMISE OF REVERSION.

ture of lease issuing out of the hereditaments and premises hereinbefore described and comprised in the said indenture, at or for the price or sum of £——. AND WHEREAS, for the purpose of effectuating and completing the said sale of the said ground-rent to the said [*purchaser*], it hath been agreed that the said company of proprietors should grant and demise the said hereditaments and premises unto the said [*purchaser*], his executors, administrators, and assigns, for the term of forty-eight years, and one quarter of another year, and one day more from the 25th day of December next, being the residue which will be then to come of the said term of fifty-seven years, granted by the said indenture, and one day over (*a*). NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £——, by the said [*purchaser*] well and truly paid to the said company of proprietors, at or immediately before the sealing and delivery of these presents, the receipt &c., the said company of proprietors by these presents Do grant, bargain, sell (*b*), and demise unto the said [*purchaser*], his executors, administrators, and assigns, ALL and singular the hereditaments and premises comprised in and demised by the above-recited indenture of lease, together with the rents and services thereby reserved, and the counterpart of the said indenture, and all easements, privileges, profits, commodities, advantages, emoluments, rights, members, and appurtenances, whatsoever, to the said hereditaments and premises belonging, or in anywise appertaining; TO HAVE AND TO HOLD the said hereditaments and premises (subject to the said indenture of lease and the term thereby granted) unto the said [*purchaser*], his executors, administrators, and assigns, from the 25th day of December, now next ensuing, for and during the term of forty-eight years, and one quarter of another year and one day more, from thence next ensuing, being the residue which will be

—of agreement to demise reversion.

Testatum.

The company demise.

Parcels.

Habendum to purchaser for a term.

(*a*) [This seems to be a superfluous caution. A demise of the reversion for a shorter term than that of the lease would be good pro tanto, and, therefore, there can be no reason why a demise for the exact period should not be equally good. Vide ante, pp. 84, 158.]

(*b*) [The better opinion seems to be, that a corporation cannot stand seised to a use; so that the demise can only operate at common law. Being, however, a grant of a reversion, actual entry is not requisite; and the statute of Anne has made the attornment of the tenant immaterial.]

52. ASSIGNMENT OF GROUND-RENT BY DEMISE OF REVERSION.

then to come of the said term of fifty-seven years granted by the said indenture of lease, and one day over, At the yearly rent of one pepper-corn if demanded. AND the said company of proprietors for themselves and their successors, and for and against the acts and defaults only of themselves, their predecessors, and successors, and all persons claiming through or under them, other than the person or persons claiming under or by virtue of the above-recited indenture of lease, do hereby covenant with the said [*purchaser*], his executors, administrators, and assigns, in manner following; (that is to say), That the above-recited indenture of lease, and the rents and covenants therein respectively reserved and contained to be paid and performed by and on the part of the lessee, are now valid and subsisting, and in nowise determined, released, or extinguished; *And* that the said company of proprietors have full right and absolute authority by these presents to demise and assign the said hereditaments, rents, and premises, in manner aforesaid, according to the true intent hereof; *And* that the same shall be respectively enjoyed and received accordingly, during the residue of the term hereby granted, free from all prior estates, charges, and incumbrances; *And* shall (*be further assured, ut ante, p.* 198). IN WITNESS, &c.]

Covenants for title, &c.

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53. BY TENANT FOR LIFE, IN CONSIDERATION OF A RENT-CHARGE.

53. RELEASE *by a* TENANT *for* LIFE, *in consideration of an* ANNUITY *secured on the Premises, to a* TRUSTEE *for the next* REMAINDERMAN *for Life, to prevent Merger.*

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; [*purchaser*], of &c., of the second part; [*purchaser's trustee*], of &c., of the third part; and [*vendor's trustee*], of &c., of the fourth part: WHEREAS the said [*vendor*] is seised of the messuages, lands, tenements, and hereditaments, hereinafter mentioned, and expressed to be hereby granted and released, with their appurtenances, for the term of his life; and the said [*purchaser*] is entitled to the said messuages, lands, tenements, and hereditaments, during his life, in remainder expectant upon the decease of the said [*vendor*]; AND WHEREAS the said [*vendor*] hath contracted with the said [*purchaser*] for the sale to him of the said messuages, lands, tenements, and hereditaments, during the remainder of the life of the said [*vendor*], in con-

Parties.

Recital of seisin of tenant for life, and of the title of tenant in remainder.

—Of contract by tenant in remainder for purchase of the estate in possession.

sideration of an annuity, or clear yearly rent-charge of £——, to be paid by the said [*purchaser*], his heirs, executors, or administrators, to the said [*vendor*] and his assigns during his life, and to be secured as hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of the annuity, or clear yearly sum of £—— sterling, secured to be paid to the said [*vendor*] and his assigns during the term of his life, as hereinafter mentioned, and of the sum of 10*s.* to the said [*vendor*] by the said [*purchaser's trustee*] already paid, he the said [*vendor*], upon the nomination of the said [*purchaser*], (testified by his executing these presents), DOTH by these presents (made *&c., ut ante, p.* 72), grant, release, and confirm unto the said [*purchaser's trustee*] and his heirs: ALL (*parcels, and general words, and all the estate, &c., ut ante, p.* 73); TO HAVE AND TO HOLD all and singular the hereditaments and premises hereinbefore mentioned and expressed to be hereby granted and released, unto the said [*purchaser's trustee*] and his heirs, during the term of the natural life of the said [*vendor*]: *Nevertheless*, to, for, and upon the uses, trusts, intents, and purposes, hereinafter limited, expressed, and declared of and concerning the same, (that is to say), To the use, intent, and purpose, that the said [*vendor*] and his assigns shall and may yearly and every year, during the term of his natural life, have, receive, and take one annual sum or rent-charge of £—— sterling, to be yearly issuing, and payable out of, and charged and chargeable upon all and singular the hereditaments and premises, and to be paid to the said [*vendor*] and his assigns, on the twenty-fourth day of June, the twenty-ninth day of September, the twenty-fifth day of December, and the twenty-fifth day of March, in every year, by equal portions, free from taxes, and without any other deduction whatsoever, [(except for or on account of the land-tax (*a*),)] the first quarterly

53. BY TENANT FOR LIFE, IN CONSIDERATION OF A RENT-CHARGE.

Testatum.

In consideration of rent-charge, and nominal pecuniary consideration.

Vendor grants.

Parcels.

Habendum.

Uses.

(*a*) Without this exception, the preceding words would have included exemption from the land-tax. *Bradbury* v. *Wright*, Doug. 624. But it should seem, though the point has escaped notice, that the land-tax does not apply to any fee-farm rent or rent-charge created since the statute 38 Geo. 3, c. 5, as that statute, (which was an annual act only, but is made perpetual by stat. 38 Geo. 3, c. 60), recites that lands "*stand*" incumbered with such charges, and then authorizes the pro-

What rents are subject to land-tax.

53. BY TENANT FOR LIFE, IN CONSIDERATION OF A RENT-CHARGE.

payment to be made on the twenty-fourth day of June next ensuing the date hereof; *And to and for this further use, intent, and purpose,* that, in case the said annual sum or rent-charge of £——, or any part thereof, shall at any time or times be unpaid by the space of fourteen days next after any of the said days whereon the same ought to be paid as aforesaid, then it shall be lawful for the said [*vendor*] or his assigns during his natural life, into and upon the said hereditaments and premises, and into and upon every or any part thereof, to enter and distrain, and the distress and distresses then and there found to take, lead, drive, carry away, and impound, and in pound to detain and keep, until the said annual sum or rent-charge of £——, and all arrears thereof, together with all costs and expenses occasioned by taking and keeping such distress and distresses, shall be fully paid and satisfied; and in default of payment thereof, or of any part thereof respectively, in due time to appraise, sell, and dispose of such distress or distresses, or otherwise to act therein according to the true course of law, in like manner as in cases of distress taken for non-payment of rent reserved upon common leases; *To the intent* that the said [*vendor*] or his assigns may be fully paid and satisfied the said annual sum or rent-charge of £——, and all arrears thereof, and all costs and expenses attending the non-payment and recovery of the same; *And to and for this further use, intent, and purpose,* that in case the said annual sum or rent-charge of £——, or any part thereof, shall at any time or times be unpaid by the space of twenty-eight days next after any of the said days hereinbefore mentioned and appointed for payment thereof, then it shall be lawful for the said [*vendor*] and his assigns, during the term of his natural life, (although no formal or legal demand shall have been made), into and upon all and singular the said hereditaments and premises, or into and upon any part thereof in the name of the whole, to enter, and the same to hold and enjoy, and the rents and profits thereof, and of every part thereof, to receive and take for his and their own use, until he or they

Power to distrain.

Power to enter.

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prietors to deduct a proportion of the land-tax in respect thereof. This seems not to extend to rents not then in esse. The exception in the text is therefore improper.

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shall thereby and therewith, or by any other means, be fully paid and satisfied the said annual sum or rent-charge of £——, and all arrears thereof, and all such arrears of the same as shall grow due or accrue during the time that he or they shall, by virtue of such entry or entries, be in possession of the said hereditaments and premises, or any part thereof; together with all costs and expenses whatsoever attending the non-payment or recovery of the same, or any part thereof, or in relation thereto. AND as to, for, and concerning all and singular the said hereditaments and premises, (subject to and charged with the said annual sum or rent-charge of £——), and the remedies hereby provided for the recovery thereof, TO THE USE of the said [*vendor's trustee*], his executors, administrators, and assigns, during the term of ninety-nine years henceforth next ensuing, in case the said [*vendor*] shall so long happen to live (*b*), upon the trusts hereinafter declared concerning the same; And after the expiration or sooner determination of the said term of ninety-nine years, and in the meantime subject thereto, TO THE USE of the said [*purchaser's trustee*], and his heirs, during the life of the said [*vendor*], *In trust*, nevertheless, for the said [*purchaser*], his executors, administrators, and assigns; AND as to, for, and concerning the said term of ninety-nine years hereinbefore limited to the use of the said [*vendor's trustee*], his executors, administrators, and assigns, determinable as aforesaid, It is hereby agreed and declared that the same is so limited to him and them, *Upon trust*, that, in case the said annual sum or rent-charge of £——, or any part thereof, shall be unpaid by the space of forty days next after any of the aforesaid days of payment, (although no formal or legal demand shall have been made), then, so often as the same shall happen, the said [*vendor's trustee*], his executors or administrators, shall and do from time to time, by and out of the rents and profits of the said hereditaments and premises, or by demising, leasing, selling, or mortgaging the said hereditaments and premises, or any of them, or any part thereof, for all or any part of the said term, or by bringing actions against the tenants or occupiers of the same hereditaments and premises, or any of them, for the rents then in arrear,

And as to the lands, subject to the rent,

to the use of vendor's trustee for ninety-nine years;

remainder to use of purchaser's trustee,

in trust for purchaser.

Trusts of ninety-nine years' term.

(*b*) As the tenant for life is the sole conveying party, the term is necessarily made determinable with his life. Perhaps the purchaser might reasonably have been asked to join in extending the term to *his* life also, as a better security for any arrears of the annuity at the vendor's decease.

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or by such other ways or means as to him or them shall seem meet, raise and levy such sum and sums of money as shall be sufficient from time to time to pay and satisfy the said annual sum or rent-charge of £——, or so much thereof as shall from time to time happen to be in arrear and unpaid; together with all costs and expenses which the said [*vendor*], or his assigns, or the said [*vendor's trustee*], his executors, administrators, or assigns, shall sustain or be put unto by reason of the non-payment of the same annual sum or rent-charge of £——, or any part thereof, at the days and times and in manner before appointed for payment thereof; and shall and do pay, apply, and dispose of the monies so to be levied and raised in or towards payment and satisfaction thereof accordingly; And, subject and without prejudice to the trusts aforesaid, shall and do stand possessed of and interested in the said hereditaments and premises, for the residue of the said term of ninety-nine years, and the rents and profits thereof, or so much of the same hereditaments and rents and profits as shall not be disposed of for the purposes aforesaid, *In trust* for the said [*purchaser*], his executors, administrators, and assigns. AND it is hereby agreed and declared that the receipt or receipts of the said [*vendor's trustee*], his executors, administrators, or assigns, shall be a sufficient discharge for any sum or sums of money which shall come to his or their hands by virtue of these presents, unto the person or persons paying the same, for so much as in such receipt or receipts shall be expressed to be received; And that the person or persons paying such sum or sums of money, and taking such receipt or receipts for the same as aforesaid, shall not be bound to see to the application, or be answerable or accountable for the loss, misapplication, or non-application thereof, or of any part thereof. AND the said [*purchaser*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*vendor*], his executors, administrators, and assigns, that he the said [*purchaser*], his heirs, executors, or administrators, will or shall pay unto the said [*vendor*] and his assigns, during the natural life of him the said [*vendor*], the said annuity or yearly rent-charge of £——, free from taxes, and without any deduction whatsoever, [(except the land-tax as aforesaid (*c*)),] at the times and in the manner and form hercin-

Receipt of the trustee to be sufficient discharge.

Purchaser covenants to pay the annuity;

(*c*) But see an observation, ante, p. 319.

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before limited and appointed for payment thereof; *And also,* that he the said [*purchaser*], his heirs, executors, or administrators, will or shall at all times hereafter save and keep harmless and indemnified the said [*vendor*], his heirs, executors, or administrators, of, from, and against all actions, suits, and other proceedings which shall or may, in the event of the decease of the said [*purchaser*] in the lifetime of the said [*vendor*], be commenced, brought, or prosecuted against the said [*vendor*], his heirs, executors, or administrators, and from and against all loss, costs, damages, and expenses which he or they shall or may in that event sustain, expend, or be put unto, for or by reason or on account of any waste which shall or may, at any time or times hereafter during the life of the said [*vendor*], be done, committed, permitted, or suffered by the said [*purchaser*], or his assigns, or any other person or persons claiming or to claim by, from, through, or under him or them, in or upon the said hereditaments and premises, or any part thereof. AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*purchaser's trustee*], and his heirs, in manner following, (that is to say), that (notwithstanding any act, deed, matter, or thing whatsoever done, executed, or suffered by the said [*vendor*], or by [*vendor's wife*], his late wife, deceased, to the contrary (*d*)) he the said [*vendor*] now, at the time of the sealing and delivery hereof, is lawfully and rightfully seised of the said hereditaments and premises during the term of his life, without any manner of condition, contingent proviso, power of limitation of any new or other use or uses, or any other restraint, matter, cause, or thing whatsoever, to alter, change, charge, revoke, make void, lessen, or determine the same; *And also* that (notwithstanding any such act, deed, matter, or thing as aforesaid) he the said [*vendor*] now, at the time of the sealing and delivery of these presents, hath in himself full power and lawful and absolute authority to grant, bargain, sell, and release the same hereditaments and premises unto the said [*purchaser's trustee*] and his heirs, to the uses and in manner aforesaid, according to the true intent and meaning of these presents. *And further,* that the said hereditaments and premises shall, and lawfully may, from

—to save the vendor harmless by reason of waste being committed.

Covenants by vendor,

—that he is seised for his life;

—that he hath power to convey;

—that premises shall remain to uses aforesaid,

(*d*) The estate of the vendor was derived under his late wife's marriage settlement.

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time to time, and at all times during the life of the said [*vendor*], remain, continue, and be to, for, and upon the uses, trusts, intents, and purposes hereinbefore limited and declared concerning the same; and shall and may be peaceably and quietly had, held, and enjoyed, and the rents and profits thereof received and taken accordingly, without the interruption, disturbance, or denial whatsoever of, from, or by the said [*vendor*] or his assigns, or any other person or persons whomsoever lawfully claiming by, through, from, or under the said [*vendor*] or the said [*vendor's wife*], his late wife, deceased: *And that* free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by him the said [*vendor*], his heirs, executors, and administrators, well and sufficiently saved harmless and kept indemnified of, from, and against all and all manner of former and other gifts, grants, rights, titles, charges, and incumbrances whatsoever, made, done, executed, or suffered by the said [*vendor*] or by the said [*wife*], his late wife, deceased, or any other person or persons lawfully claiming by, from, through, under, or in trust for them or either of them. *And moreover*, that he the said [*vendor*], and every other person lawfully claiming by, from, or under the said [*vendor*] or the said [*wife*], his late wife, deceased, will and shall, at any time or times hereafter during the life of the said [*vendor*], at the request, costs, and charges of the said [*purchaser*], his heirs or assigns, make, do, execute, and perfect, or procure to be made, done, executed, and perfected, all further lawful acts, deeds, conveyances, and assurances in the law whatsoever for the more effectually granting, releasing, and assuring the said hereditaments and premises, any of them or any part thereof, to, for, and upon the uses, trusts, intents, and purposes aforesaid, during the natural life of the said [*vendor*], as by the said [*purchaser*], his heirs, or assigns, or any of them, or his, their, or any of their counsel in the law, shall be reasonably devised or advised and required: [so that, &c., *ut ante*, *p.* 77.] IN WITNESS &c.

free from incumbrances;

and for further assurance.

54. CONVEYANCE *of* FREEHOLDS, COVENANT *to* SURRENDER COPYHOLDS, *and* ASSIGNMENT *of* LEASEHOLDS, *by a* TENANT *for* LIFE *and* REMAINDERMAN; *the* HEIR-AT-LAW *of the late Owner as to the Freeholds and Copyholds, and the* EXECUTORS *and* TRUSTEES *of the Will as to the Leaseholds, join, and also a* FORMER VENDOR, *for the Purpose of conveying some* PARCELS *which were* OMITTED *in the* TESTATOR'S CONVEYANCE. *Proviso in respect of Tenant's Liability to* REBUILD *a* MESSUAGE, *which the Testator had pulled down.*

54. FREEHOLDS, COPYHOLDS, AND LEASEHOLDS, BY TENANT FOR LIFE AND REMAINDERMAN.

THIS INDENTURE, made the —— day of ——, BETWEEN [*devisee for life*] and [*devisee in remainder*], of the first part; [*executors*], of &c., of the second part; [*heir-at-law*], of the third part; [*former vendor*], of &c., of the fourth part; [*agent*] (*a*), of &c., of the fifth part; and [*purchaser*], of &c., of the sixth part. WHEREAS, by indenture of demise bearing date on or about &c., and made &c.; They the said [*lessors*] did demise unto the said [*former vendor*], ALL THAT &c., *To hold* the same unto the said [*former vendor*], his executors, administrators, and assigns, from Michaelmas then last, for the term of thirty-one years, at the yearly rent of £——, and subject to the covenants and agreements therein contained on the lessee's or tenant's part to be paid, observed, and performed. AND WHEREAS, by indentures of lease and release, the latter bearing date &c., and made &c., the freehold hereditaments hereinafter mentioned and described, and intended to be hereby released, were appointed and released or otherwise assured by the said [*former vendor*], (subject to a power of appointment which was never exercised, and to certain limitations unto and for the benefit of the said [*testator*], which determined at his decease (*b*), here-

Parties.

Recital of lease.

Lease and release and assignment.

(*a*) The purchase was made by an agent, who is joined in the deed for the purpose of acknowledging the agency. Any other mode of doing this would, of course, be sufficient.

(*b*) We sometimes find, in recitals of deeds, limitations detailed at great length, which never arose, and which ought, if noticed at all, to

As to recital in deeds.

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inafter mentioned), *To the use* of the said [*testator*], his heirs and assigns, for ever. And by the said indenture of release, the said [*former vendor*] did assign unto the said [*testator*], his executors, administrators, and assigns, ALL THAT (*transcribe leasehold parcels from the recited deed*), *To hold* the same unto the said [*testator*], his executors, administrators, and assigns, for the then residue of the said term of thirty-one years, subject to the rents, covenants, and agreements contained in the said indenture of demise. AND WHEREAS the said fields or closes called ——, containing fifteen acres or thereabouts, comprised in the said indenture of lease of the —— day of ——, and the residue of the said term of thirty-one years therein, were included in the purchase made by the said [*testator*] of the said [*former vendor*], which he the said [*former vendor*] doth hereby admit; But, by mistake, the same premises were not assigned to the said [*testator*] by the said indenture of the —— day of ——. (*Recite*

Mistake in the omission of part of leaseholds in the recited deed.

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be referred to with the utmost possible conciseness, and in such a manner as to prevent the attention of persons perusing the deed from being drawn to circumstances which subsequent events have rendered immaterial, by which the labour of tracing the history of the title is unnecessarily increased. Much has been said in recent discussions, which the projected alterations in the law of real property have created, respecting the propriety of introducing recitals in deeds, and some gentlemen appear to think that they might be altogether dispensed with; but this would be impossible in some cases, and inconvenient in nearly all. Such part of the anterior documentary title as is requisite to shew the interests of the respective parties, accompanied with a clear and minute detail of all material extrinsic facts, of which the recitals in deeds often afford a valuable record, should be stated; and in no manner can this statement so conveniently be introduced as by way of recital, for the practice which formerly prevailed of throwing such statements into the subsequent parts of the deeds, which the disuse of recitals renders almost unavoidable, is not conducive to perspicuity. But let not these observations be misconstrued into a defence of the plan of incumbering deeds with long and intricate recitals not requisite to elucidate the actual state of the title, and often positively mischievous, by furnishing notice of deeds and circumstances, into which length of time would otherwise have rendered it unnecessary to inquire. The skill of the draftsman is more displayed in the judicious selection of the facts to be recited, and the succinctness and lucid arrangement of the recitals, than in any other part of the deed: his aim will be to reject all that is extraneous, and to state with perspicuity and precision all that is material. Some practitioners have succeeded in attaining these objects to a great extent, and have shewn that attention to style is not inconsistent with a due regard to technical forms.

testator's admission to copyholds, ut infra, p. 328). And whereas the said [*testator*], by his last will and testament in writing, bearing date the —— day of ——, bequeathed unto his sister [M. T.], since deceased, an annuity of 105*l.*, and unto his brother [R. S.] an annuity of 100*l.*; and the said testator directed, that, in case his personal estate should not be sufficient to satisfy the said annuities and sums of money, the same should be charged upon his real estate; and he did thereby give, devise, and bequeath all and singular his manors, messuages, lands, tenements, and hereditaments (*c*) unto [A. B.] and [C. D.] (*d*), their heirs and assigns, *To the use* of his wife, the said [*devisee for life*], for life, without impeachment of waste; with remainder *To the use* of his the said testator's trustees and their heirs, during her life, to preserve contingent remainders; with remainder (subject to an intervening remainder to the testator's child or children by his said wife, which did not take effect), *To the use* of his nephew, the said [*devisee in remainder*], his heirs and assigns, for ever. And the said testator did thereby bequeath unto the said [*executors*] all his leasehold messuages, lands, tenements, and hereditaments, *To hold* to them, their executors, administrators, and assigns, for the residue of his estate and interest therein, Upon trust to permit the same to be held and enjoyed by the person who should, for the time being, be entitled to the possession of his freehold estates, under the limitations thereinbefore contained. And the said testator did thereby appoint the said [*executors*], executors of his said will. And whereas the said [*testator*] duly made and published a codicil to his said will, which codicil bears date the —— day of ——, but did not thereby revoke or alter the several devises and bequests hereinbefore mentioned to be contained in the said will. And the said [*testator*] departed this life on or about the —— day of ——, leaving the

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Recital of testator's will.

Codicil.

Death of testator.

(*c*) That by the old law copyholds passed under these words, though there had been no surrender to the use of the will, vide *Doe* d. *Clark* v. *Ludlam*, 7 Bing. 275; 5 Moo. & P. 48, which settled the point in a manner agreeably to the editor's anticipations, vide 2 Jarm. Pow. Dev. 124. [*Edwards* v. *Barnes*, 2 Scott, 411; *Weigall* v. *Brome*, 6 Sim. 99; 1 Jarm. on Wills, 612. The case is now provided for by express enactment. Stat. 7 Will. 4 & 1 Vict. c. 26, s. 26.]

(*d*) As the estate was clearly vested in the wife and nephew under the devise to them, A. B. and C. D. are not made parties to the deed.

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said [*heir-at-law*], his eldest brother and heir-at-law; and soon after his decease the said [*executors*] duly proved the said will and codicil in the Prerogative Court of the Archbishop of Canterbury. AND WHEREAS, the messuage or tenement and barn expressed to be demised by the said indenture of the —— day of —— having been pulled down and the materials removed by the said [*former vendor*], the lessors named in the said lease required the said [*testator*] to rebuild the said messuage or tenement and barn. AND WHEREAS, at a court holden in and for the manor of ——, in the parish of —— aforesaid, on or about the —— day of ——, the said [*devisee for life*], as devisee for life under or by virtue of the said will, and the said [*devisee in remainder*], as devisee in remainder (*e*) in fee-simple under or by virtue of the same will, were respectively admitted tenants of the copyhold or customary pieces or parcels of land and hereditaments hereinafter described, to hold the same at the will of the lord, according to the custom of the said manor. AND WHEREAS the said [*agent*] hath contracted with the said [*devisees*] for the absolute purchase of the freehold hereditaments hereinafter described, and the inheritance thereof in fee-simple, and of the copyhold hereditaments hereinafter described, and the inheritance thereof, according to the custom of the said manor of [*manor*], and also of the leasehold premises hereinbefore mentioned, for the residue of the said term of thirty-one years therein, (but nevertheless, as to the said leasehold premises, subject to the aforesaid claim by the lessors of the same premises, for rebuilding the said messuage or tenement and barn so removed as aforesaid), at or for the price or sum of 3000*l.* AND WHEREAS the said [*agent*] purchased the said freehold, leasehold, and copyhold hereditaments respectively as the agent for and on the behalf of the said [*purchaser*]. AND WHEREAS, [for the purposes of the act of Parliament imposing ad valorem duties upon conveyances, and] in order that a distinct consideration for the said freehold and leasehold, and for the said copyhold hereditaments may be set forth in or upon the principal or only instrument of conveyance relating thereto respective-

Waste on part of the leaseholds.

Admission of devisees to copyholds.

Contract by agent.

Agent purchased for principal.

Apportionment of the consideration.

(*e*) [The admittance of the particular tenant is in general the admittance of the remainderman, but in many manors this rule is excluded by the custom. See *Richardson* v. *Kensit*, 6 Scott, 419.]

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ly (*f*), the said purchase-money or sum of 3000*l.* hath been apportioned in manner hereinafter mentioned, (that is to say), the sum of 2600*l.* as and for the price or consideration-money for the purchase of the freehold and leasehold hereditaments, and the sum of 400*l.*, or other part thereof, as and for the price or consideration-money for the purchase of the copyhold hereditaments. AND WHEREAS the said freehold, copyhold, and leasehold hereditaments expressed to be hereby respectively released and assigned, and covenanted to be surrendered, have been exonerated from the payment of the said annuities of 105*l.* and 100*l.*, by the said will bequeathed to the said [*annuitants*] respectively as aforesaid. AND WHEREAS the said [*heir*] hath consented to join in the assurance of the said freehold hereditaments purchased by the said [*purchaser*] as aforesaid; and the said [*former vendor*] hath agreed to assign so much of the leasehold hereditaments comprised in the above-recited indenture of lease as was omitted and left out of the above-recited indenture of assignment as aforesaid. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of the sum of 2600*l.* sterling, (being the part of the said sum of 3000*l.* apportioned as the price or consideration for the purchase of the said freehold and leasehold hereditaments as aforesaid), to the said [*devisee*] paid by the said [*purchaser*] at or before the sealing and delivery of these presents, with the consent of the said [*agent*], (testified by his executing these presents,) the receipt of which sum of 2600*l.* they the said [*devisees*] do hereby respectively acknowledge, and from the same do, and each of them doth, release and discharge the said [*purchaser*], his heirs, executors, and administrators, for ever, by these presents, And also in consideration of the sum of 10*s.* to the said [*heir*] already paid by the said [*purchaser*], They the said [*devisees*], with the consent of the said [*agent*], (testified as aforesaid), *Do*, and each of them *Doth*, by these presents, made &c., (*ut ante*, *p.* 72) (*g*),

Annuities paid off.

Testatum.

Devisees, and also the heir, with the consent of the agent, convey.

(*f*) [The Stamp Act, 55 Geo. 3, c. 184, only requires that the consideration money should be apportioned, and the statement in the text of the object of the apportionment is not necessary.]

(*g*) Where tenant for life and reversioner or remainderman join in conveying the entire fee-simple, a lease for a year is unnecessary, for the courts, in order to give effect to the intention, would no doubt construe the deed as operating first as a grant of a reversion or remainder, and then as a surrender of the estate for life; see 2 Roll. Ab. 428, (K.),

As to the necessity of a lease-for-a-year stamp.

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grant, bargain, sell, release, and confirm; And the said [*heir*], at the request of the said [*devisees*], (testified as aforesaid), *Doth*, by way of assurance only, and not of warranty or covenant, bargain, sell, and release unto the said [*purchaser*], and his heirs, ALL THAT (*freehold premises and general words*).

Freehold premises.

Habendum.

TO HAVE AND TO HOLD the said hereditaments and premises hereinbefore described and expressed to be hereby granted and released, unto the said [*purchaser*], and his heirs TO THE USE of the said [*purchaser*], his heirs and assigns, for ever, (*or to uses to prevent dower, ut ante, p.* 73).

Further testatum.

AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said contract, And in consideration of the said sum of 2600*l.* so paid as aforesaid, and of 10*s.* to the said [*former vendor*] and [*executors*] already paid by the said [*purchaser*], He the said [*former vendor*], at the request of the said [*legatee for life*], [*legatee in remainder*], and [*executors*], and with the consent of the said [*agent*], (testified as aforesaid), As to so much and all such part or parts of the said leasehold hereditaments demised by the above-recited indenture of demise of the —— day of ——, 18—, as is or are not

Assignment of leaseholds by legatees, executors, and former vendor.

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pl. 2; and it would be proper to frame the deed accordingly. The conveying part would then run as follows:—

Variation where tenant for life surrenders.

"The said [*reversioner* (or, *remainderman in fee*)], as to, for, and concerning the reversion [*or*, remainder] in fee-simple, expectant on the determination of the said estate for life of the said [*tenant for life*] of and in the said —— and hereditaments hereinafter described, *Doth* grant, bargain, sell, and confirm; and the said [*tenant for life*], as to, for, and concerning his estate for life of and in the said —— and hereditaments, and to the intent that such estate for life may be extinguished in the reversion [*or*, remainder] and inheritance in fee-simple of the same hereditaments, *Doth* bargain, sell, surrender, and yield up, unto the said [*purchaser*], his heirs and assigns, ALL THAT" &c.

The precedent in the text, however, exhibits the most frequently adopted mode of conveying lands by a tenant for life and reversioner or remainderman. Its advantage over the mode just pointed out is, that, if, by reason of the existence of an outstanding intervening estate in trustees to preserve contingent remainders, or otherwise, the estate for life could not pass by surrender, it would nevertheless be vested in the purchaser by the lease and release, or by the statutory conveyance which now combines the effect of both those deeds.

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comprised or included in the above-recited indenture of assignment of the ——day of ——, 18—, by these presents, *Doth* bargain, sell, assign, and transfer; And the said [*executors*], at the request of the said [*legatees*], (testified as aforesaid), As to the residue of the leasehold hereditaments hereinafter described and hereby assigned, by these presents, *Do*, and every of them *Doth*, bargain, sell, assign, and transfer; And the said [*legatees*], by these presents, *Do*, and each of them *Doth*, grant, bargain, sell, and confirm, unto the said [*purchaser*], his executors, administrators, and assigns, ALL AND SINGULAR the hereditaments and premises comprised in and demised by the above-recited indenture of demise of the —— day of ——, 18—, And all the estate &c. (*ut ante, p.* 184). TO HAVE AND TO HOLD the said hereditaments, and all and singular other the premises expressed to be hereby assigned unto the said [*purchaser*], his executors, administrators, and assigns, henceforth for and during all the residue now to come and unexpired of the said term of thirty-one years, granted by the said indenture of demise of the —— day of ——, 18—, as aforesaid, subject nevertheless to the payment of the rent, and to the performance of the covenants and agreements thereby reserved and therein contained, and henceforth on the tenant's or lessee's part to be paid, observed, and performed, and, subject to such claims as aforesaid of the lessors named in the said lease, to rebuild the said messuage or tenement so pulled down and removed as aforesaid. (*Covenant by former owner and executors, that they have not incumbered, ut ante, p.* 106 (*h*)). AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said agreement, and in consideration of the sum of 400*l.* sterling, (being the part of the said sum of 3000*l.* apportioned as the price of, or consideration for, the purchase of the copyhold hereditaments hereinafter covenanted to be surrendered), paid, &c.; the receipt &c., (*ut ante, p.* 329). The said [*devisees*] and [*heir-*

Habendum.

Further testatum.

Covenant to

(*h*) In this instance, the former owner covenanted only that he had not incumbered; though it is more correct that a person who conveys parcels omitted by mistake in a former conveyance should enter into the same covenants as were contained in the conveyance in which the parcels were omitted to be inserted, and which covenants, in the present instance, would be the ordinary limited covenants for title, as the vendor seems to have been beneficial owner.

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surrender copyholds by devisees and heir.

at-law) do hereby, for themselves severally, and for their respective heirs, executors, and administrators, covenant with the said [*purchaser*], his heirs and assigns, that the said [*devisees*] and [*heir*], and all other necessary parties, will and shall forthwith, as soon as conveniently may be, at the request, costs, and charges of the said [*purchaser*], his heirs, executors, administrators, or assigns, surrender or cause to be surrendered into the hands of the lord or lords, lady or ladies, for the time being of the said manor of [B.], according to the custom of the said manor; ALL THAT &c., (*copyhold parcels*), TO THE USE of the [*purchaser*], his heirs and assigns, for ever, at the will of the lord, according to the custom of the said manor. AND the said [*devisee for life*], for himself, his heirs, executors, and administrators, and as to, for, and concerning the said freehold, leasehold, and copyhold hereditaments and premises hereby granted, released, and assigned, and covenanted to be surrendered, or intended so to be, during the life of the said [*devisee for life*], and as to the estate, right, title, quiet enjoyment, freedom from incumbrances, and further assurance thereof during such his life estate therein, but so nevertheless, as to the leasehold premises, as not to extend beyond the residue of the said term of thirty-one years granted thereof as aforesaid; And the said [*devisee in remainder*], as to, for, and concerning the said freehold, copyhold, and leasehold hereditaments and premises, after the decease of the said [*devisee for life*], and as to the estate, right, title, quiet enjoyment, freedom from incumbrances, and further assurance of the remainder in fee-simple, expectant on the decease of the said [*devisee for life*], of and in the freehold and copyhold hereditaments, and the residue (if any) which shall be then unexpired of the said term in the said leasehold premises (*i*), do respectively hereby

Covenants by devisee for life, and devisee in remainder, each as to his interest in the freeholds, copyholds, and leaseholds.

Variation in covenants where one covenantor has an undivided moiety for life only, and the other covenantor the remaining moiety for life, and the entirety in remainder.

(*i*) Variation in covenants by tenant for life and remainderman:—

"AND the said [*tenant for life*], doth hereby, for himself, his heirs, executors, and administrators, as to one undivided moiety, during his life, of the hereditaments and premises expressed to be hereby granted and released, and as to the estate, right, title, quiet enjoyment, and further assurance of such life estate, but no further or otherwise; And the said [*remainderman*] doth hereby, for himself, his heirs, executors, and administrators, and as to the entirety of the

covenant with the said [*purchaser*], his heirs, executors, and administrators, in manner following, (that is to say), That,

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said hereditaments and premises, (subject, as to a moiety, to the life estate intended to be hereby released of the said [*tenant for life*]), and as to the estate, right, title, quiet enjoyment, and further assurance thereof, subject as aforesaid."

"And the said [*first covenantor*] doth hereby, for himself, his heirs, executors, and administrators, as to one undivided moiety of the said hereditaments and premises hereinbefore expressed to be hereby granted and released for an estate in fee-simple, and for the estate, right, title, quiet enjoyment, freedom from incumbrances, and further assurance of the same moiety; and also as to the remaining moiety thereof during his life only, and for the estate, right, title, quiet enjoyment, freedom from incumbrances, and further assurance of the said remaining moiety during his life; and the said [*second covenantor*] doth hereby, for himself, his heirs, executors, and administrators, and as to the same remaining moiety of the said hereditaments and premises, after the decease of the said [*first covenantor*], and for the estate, right, title, quiet enjoyment, freedom from incumbrances, and further assurance of or respecting such remaining moiety of the said hereditaments and premises in remainder in fee-simple, expectant on the decease of the said [*first covenantor*], covenant with the said [*purchaser*]," &c.

Further variation where one covenantor has a life estate in the entirety, and the remainder in fee in one moiety, and the other covenantor has the remainder in fee in the remaining moiety.

Where, however, the nature of the interests of the covenantors is such as to render it inconvenient to specify them in the covenant, and, indeed, in other cases where brevity is an object, reference may be made to the interests of the parties thus:—

Remarks upon the mode of framing covenants by persons having various interests.

"And the said [*covenantors*], as to, for, and concerning their said respective parts, shares, and interests of and in the said hereditaments, and no further or otherwise."

This form supposes that the estates of the covenantors will have been, as they ought to be, distinctly described in the antecedent parts of the deed; but, even then, it is generally better to repeat the statement at the commencement of the covenant, in order to make the covenants complete in themselves without reference to the context, which tends greatly to simplify the pleadings in actions on the covenants. And this object may generally be effected in very few words. Thus, the covenant by a tenant for life and reversioner or remainderman, instead of the longer form in the text, may be expressed as follows:—

"And the said [*tenant for life*], as for and concerning the

Shorter form of

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notwithstanding any act, deed, matter, or thing by the said [*devisees*], or either of them, or by the said [*testator*], deceased, made, done, permitted, or suffered, to the contrary, They the said [*devisees*] and [*heir*], or some or one of them, now, at the time of the sealing and delivery of these presents, are or is lawfully, rightfully, and absolutely seised of the said freehold hereditaments and premises hereinbefore described and expressed to be hereby granted and released, and the inheritance thereof in fee-simple; And also are or is seised of the said copyhold hereditaments and premises hereby covenanted to be surrendered, for an absolute estate of inheritance, according to the custom of the said manor of [B.], without any manner of condition, contingent proviso, trust, power of revocation, or limitation of any new or other use or uses, or any other restraint, cause, matter, or thing, to alter, change, charge, revoke, make void, lessen, incumber, or determine the same freehold and copyhold hereditaments respectively; *And also*, that for and notwithstanding any such act, matter, or thing as aforesaid, the above-recited indenture of demise of the —— day of —— is a good and sufficient lease, valid in the law, of and for the said premises hereby assigned, or intended so to be, and is not forfeited, surrendered, or in anywise rendered void or voidable; *And also*, that for and notwithstanding any such act, matter, or thing as aforesaid, the said [*devisees*], [*heir*], [*executors*], and [*former owner*], or some or one of them, now, at the time of the sealing and delivery of these presents, have or hath in themselves, himself, or herself, good right, full power, and absolute authority to grant, release, surrender, and assure the said freehold and copyhold hereditaments and premises unto and to the use of the said [*purchaser*], his heirs and assigns, for ever(*k*), in the manner hereinbefore expressed

As to seisin of the freehold and copyhold.

Lease is good.

Power to release freeholds, surrender copyholds, and assign leaseholds.

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covenants by tenant for life and remainderman.

estate for life to which he claims to be entitled in the said hereditaments hereby released; and the said [*reversioner*, (or *remainderman*)], as for and concerning the inheritance in fee-simple in reversion [*or* remainder] therein, expectant on the said estate for life, do for themselves respectively, and their respective heirs, &c., covenant" &c.

(*k*) Or, if to uses to prevent dower—

" to the uses hereinbefore declared."

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concerning the same premises respectively, and to assign the said leasehold hereditaments and premises unto the said [*purchaser*], his executors, administrators, and assigns, for all the now residue of the said term of thirty-one years therein in manner aforesaid, and according to the true intent and meaning of these presents; *And further*, that it shall be lawful for the said [*purchaser*], his heirs and assigns, from time to time, and at all times hereafter, to hold and enjoy the said freehold and copyhold hereditaments and premises, and to receive and take the rents and profits thereof; And also for the said [*purchaser*], his executors, administrators, and assigns, from time to time and at all times hereafter during the continuance of the said term of thirty-one years, to hold, possess, and enjoy the said leasehold hereditaments and premises, and to receive and take the rents and profits thereof, without any interruption or disturbance of, from, or by the said [*devisees*], or either of them, or of, from, or by any other person or persons lawfully claiming by, from, through, under, or in trust for them or either of them, or the said [*testator*], deceased, subject nevertheless, as to the said copyhold hereditaments, to the customary rents and services henceforth to become due in respect thereof, and as to the said leasehold premises, to the payment of the rent and the observance and performance of the covenants and conditions reserved and contained by and in the hereinbefore-recited indenture of demise of the —— day of ——, and henceforth on the lessee's part to be paid, observed, and performed; *And that* free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said [*devisees*], or one of them, or the heirs, executors, or administrators of them or of one of them, effectually kept harmless and indemnified of, from, and against all and all manner of former and other estates, titles, charges, and incumbrances whatsoever, made, done, executed, occasioned, or suffered by the said [*devisees*], or either of them, or by the said [*testator*], deceased, or any person or persons lawfully claiming by, from, through, under, or in trust for them or any of them, or by or through the acts, default, privity, consent, or procurement of them or of any of them, save and except, as to the leasehold hereditaments, such claim as aforesaid of the said [*lessors*] for the rebuilding the said messuage or tenement and barn so pulled down and removed as aforesaid; *And moreover*, that

Quiet enjoyment.

Free from incumbrances.

Further assurance.

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they the said [*devisees*] respectively, and their respective heirs, executors, and administrators, and all and every other person and persons lawfully claiming any estate, right, title, or interest in, to, or out of the said freehold, copyhold, and leasehold hereditaments and premises, or any of them, or any part thereof respectively, by, from, through, or under them, or either of them, or the said [*testator*], deceased, will and shall from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said [*purchaser*], his heirs, executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and executed, All such further acts, deeds, matters, and things, conveyances and assurances in the law whatsoever, for the more effectually granting, releasing, surrendering, assigning, and assuring the said freehold, copyhold, and leasehold hereditaments and premises unto and to the use of the said [*purchaser*], his heirs, executors, administrators, and assigns, or otherwise, as he or they shall direct, As by the said [*purchaser*], his heirs, executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably required, [so that &c., *ut ante*, *p.* 77].

Purchaser covenants to pay rent and perform covenants of lease;

And the said [*purchaser*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*devisees*] and [*executors*], and each and every of them, and the executors and administrators of them and of each and every of them, That he the said [*purchaser*], his heirs, executors, administrators, or assigns, will or shall, at all times hereafter during the continuance of the said term of thirty-one years, pay the said yearly rent of £—— by the said indenture of demise of the —— day of —— reserved and made payable, and perform and observe all and every the covenants and agreements in the same indenture contained, and which henceforth on the tenant's or lessee's part are or ought to be paid, performed, and observed, according to the purport of the same indenture; *And that* he the said [*purchaser*], his executors, administrators, or assigns, or some or one of them, will or shall, at all times hereafter, effectually save harmless and keep indemnified the said [*devisees*] and [*executors*], and every of them, and the executors and administrators of them and of every of them, and the heirs, executors, and administrators for the time being of the said [*testator*], deceased, from and against the said rents, covenants, and agreements, as to every

—To indemnify vendors against certain dilapidations.

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breach, default, or neglect of or in the payment of or performance thereof which shall at any time or times hereafter happen to be made or done; And also from and against all actions, suits, and other proceedings which can, shall, or may be had, brought, commenced, or prosecuted for or by reason or means or on account of the said messuage or tenement and barn having been pulled down and removed as aforesaid, or in consequence of the same not having been rebuilt, and from and against all costs, charges, damages, and expenses which shall or may be incurred or sustained by reason or on account of any such action, suit, or other proceeding to be had, brought, or prosecuted as aforesaid. IN WITNESS &c.

I. ON THE TRANSMISSION OF THE LIABILITY UNDER, AND THE BENEFIT OF COVENANTS.

WHEN COVENANTS RUN WITH THE LAND.

[Preliminary to the inquiry, whether the relative situations of the parties to a covenant are such as to make the burthen or the benefit of it transmissible to assignees, is the inquiry, whether the subject-matter of the covenant itself is of a nature to fit it for such transmission. "The authorities lay down, 1st, that, in order to make a covenant run strictly with the land, so as to bind the assignee, or give him the benefit without his being named, it must relate directly to the land, or to 'a thing in existence parcel of the demise;' 2ndly, that, where it respects a thing not in existence at the time, but which, when it comes into existence, will be annexed to the land, the covenant may be made to bind the assignees by naming them, but will not bind them unless named; and, 3rdly, that, where it respects a thing not annexed, nor to be annexed, to the land, or a thing collateral, or in its nature merely personal, the covenant will not run, that is, will not bind the assignee nor pass to him, even though he is named. These rules appear to have been originally laid down with reference to leases, but authorities are not wanting in which they have been treated as applying equally to cases not involving the relation of landlord and tenant. They are usually laid down as constituting the whole of the settled law on this subject, and appear to apply equally, whether we consider the *burthen* or the *benefit* of covenants." Third Rep. of Real Prop. Com. 45.]

What covenants run with the land.

Where assignee not named.

Obligation of covenants.

[The question as to the liability of an assignee to perform covenants entered into by the party under whom he claims may arise in three very different cases:—1st, where the covenantor and covenantee stood in the relation of landlord and tenant; 2ndly, where the covenantor and covenantee stood in the relation of assignor and assignee; and, 3rdly, where the covenantor and covenantee were strangers in respect of the title to the land when the covenant was made.]

Where the obligation runs with the land.

[1. Liability of assignees of reversions. The preamble of the stat. 32 Hen. 8, c. 34, is silent on this point; but after reciting, that, by "the

Assignees of reversions.

WHEN COVENANTS RUN WITH THE LAND.

Obligation of covenants.

Stat. 32 Hen. 8, c. 34.

common law of this realm, no stranger to any covenant, action, or condition shall take any advantage or benefit of the same by any means or ways in the law, but only such as be parties or privies thereunto," and remedying that defect, (ante, Vol. 4, p. 421), proceeds, by way of equivalent, to give to lessees and their assigns the like remedy against the grantees of the reversions as they might have had against the lessors themselves, (except as to recoveries in value upon warranties). It appears therefore to have been taken for granted, that, where the assignee of the reversion could not sue, he could not be sued. No authority is to be found on this point; but, if the general opinion is correct, that, at common law, the assignee of the reversion could not sue on any other than covenants in law, it must be concluded, that, prior to the statute, he was under no liability to be sued on any express covenants. See, however, infra, p. 355. His liability under the statute extends to all covenants which "relate to the land;" as to which, vide ante, Vol. 4, p. 425.]

Liabilities of assignees of leases.

Spencer's case.

What are inherent and what are collateral covenants.

[On the other hand, the lessee's assignee was bound, at the common law, by such covenants as related to the land—but with a difference. For, in *Spencer's case*, 5 Rep. 16, where the action was brought by the lessor against an assignee of the lessee for breach of a covenant by the lessee, for himself, his executors and administrators, that he, his executors, administrators, or assigns, would build a wall upon part of the land demised, these distinctions were taken: "1. Where the covenant extends to a *thing in esse parcel of the demise*, the thing to be done by force of the covenant is quodammodo annexed and appurtenant to the thing demised, and shall bind the assignee, although he be not bound by express words; but when the covenant extends to a thing that is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being. As, if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore quodammodo is annexed appurtenant to houses, and shall bind the assignee although he be not bound expressly by the covenant (*a*); but, in the case at bar, the covenant concerns a thing which was not in esse at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being" (*b*).]

(*a*) [See *Tatem* v. *Chaplin*, 2 H. Bl. 133. The same rule holds good with respect to the heir, and with respect to the *benefit* of covenants; so that a covenant touching the land, made with a reversioner in fee, his executors and administrators, will enure to the benefit of the heir. *Lougher* v. *Williams*, Lev. 92. See Palm. 558; Clayt. 60. "For a covenant which runs and rests with the land, an action lies for or against the assignee at the common law, quia transit terra cum onere, although the assignees be not named in the covenant." Per Cur., *Bally* v. *Wells*, 3 Wils. 29. *Kitchen* v. *Buckley*, Sir T. Raym. 80; 1 Lev. 109: *Sacheverell* v. *Froggatt*, 2 Saund. 367; 1 Vent. 161.]

(*b*) [This distinction is sufficiently fine. The law was stated differ-

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["2. It was resolved, that, in this case, if the lessee had covenanted, for him *and his assigns*, that they would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised, it should bind the assignee. For, although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. So, on the other side, if a warranty be made to one, his heirs and assigns, by express words, the assignee shall take the benefit of it, and shall have a warrantia chartæ. (F. N. B. 135 ; and 9 E. 2, 1, Garr. de Charters, 30 ; 36 E, 3, Garr. 1 ; 4 H. 8 ; Dy. 1). But, although the covenant be for him and his assigns, yet, if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged, as if the lessee covenants for him and his assigns to build a house upon the land of the lessor, which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee." See the cases as to what covenants sufficiently concern the land to run with it, collected, ante, Vol. 4, p. 425.]

As to action of debt against lessee and assignee.

[The liability of the assignee to be sued in *debt* for the rent reserved, must not be confounded with his liability upon the covenants. The former liability is founded on the nature of the reservation, which is annexed to and issues out of the land, so that "the assignee who hath the land and is privy in estate is debtor in respect of the land. So, if a man leases three acres rendering rent, and the lessor oust the lessee of one acre, he shall have an action of debt for no part ; but if the lessor recovers part in an action of waste, or enters into part for a forfeiture, or by surrender, or by special condition for entry into part, or if part of the land be evicted by title paramount,—in all these cases the rent reserved on the lease for years, which is a rent-service, shall be appor-

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ently in Moore, 159 ; cit. *Bally* v. *Wells*, 3 Wils. 29. "If lessee for life covenants, for himself, his executors and administrators, to build a wall within his term, and afterwards he assigns over his estate, the grantee of the reversion shall have covenant against the assignees ; and notwithstanding the covenant wants the word 'assigns,' yet every assignee, by accepting the possession, hath made himself subject to all covenants concerning the land, but not to collateral covenants ; and covenants of repairs and building walls or houses are covenants inherent in the land, with which the assignee without special words shall be charged. For a covenant which runs and rests with the land, an action lies for or against the assignee at the common law, quia transit terra cum onere, although the assignees be not named in the covenant." But the Court, in *Bally* v. *Wells*, said, they rather chose to adhere to Lord Coke's opinion, 3 Wils. 32. The point decided in *Bally* v. *Wells* was, that the obligation of a covenant by a lessee of tithes would bind his assignee, notwithstanding the subject-matter was incorporeal. In *Smith* v. *Arnold*, 3 Salk. 4, the decision was directly contrary to this distinction in *Spencer's case*, an assignee of a lease being held chargeable for breach of a covenant to build an outhouse. And the same point was assumed in *Grescott* v. *Green*, 1 Salk. 199; and see *Easterby* v. *Sampson*, 1 Cr. & J. 118. However, see *Anon.*, 12 Mod. 384; *Cockson* v. *Cock*, Cro. Jac. 125.]

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tioned. Ergo, the contract follows the land, for otherwise the lessor might in all those cases have an action of debt for the whole rent, in respect of the contract, as he shall have on a sale of goods. So, on the other hand, if the lessor grants over his reversion, now the contract runneth with the estate, and therefore the grantor shall not have an action of debt for rent due after his assignment; but the grantee and the lord by escheat shall have it, for the privity of the contract follows the estate in the land, and is not annexed to the person but in respect of the estate." After assignment the lessor may charge the lessee, or his assignee, at his election; and, if he accept rent of the assignee, he hath determined his election, and shall not afterwards sue the lessee in *debt*. (Ante, Vol. 4, p. 359). "And, first, for the apprehending the true reason of this case, it is to be known, that, as to the matter now in quest, there are three manner of privities, scil. privity in respect of estate only, privity in respect of contract only, and privity in respect of estate and contract together. Privity of estate only; as, if the lessor grants over his reversion, (or if the reversion escheat); between the grantor (or the lord by escheat) and the lessee, is privity of estate only; so, between the lessor and the assignee of the lessee, for no contract was made between them. Privity of contract only, is personal privity, and extends only to the person of the lessor and to the person of the lessee; as in the case at bar, when the lessee assigned over his interest, notwithstanding his assignment, the privity of contract remained between them, although the privity of estate be removed by the act of the lessee himself. The third privity is of contract and estate together, between the lessor and the lessee himself. *Walker's case*, 3 Rep. 22. See *Thursby* v. *Plant*, 1 Saund. 237.]

Privity of estate and privity of contract.

Liability of purchaser's assignee.

[2. Liability on covenants entered into on a conveyance or assignment. The practical distinction, for this purpose, between covenants in a lease and covenants in a conveyance or assignment of the grantor's whole estate, is obvious. Leases are ordinarily qualified with covenants on the part of the lessee and his assigns, and every purchaser of a leasehold estate looks to the original lease as the foundation of his title and the source of information as to his liabilities. But a vendor who conveys his estate out and out, on the contrary, does not usually exact any permanent covenant or engagement from the purchaser (*a*), and purchasers do not consider themselves bound to look beyond the immediate conveyance to their own vendors; and great injustice might be inflicted on purchasers if they were held liable on covenants of the existence of which they might not have had even constructive notice. Upon this branch of the subject the following observations of the Real Property Commissioners, in their Third Report, (p. 52), deserve particular attention:—

Covenants en-

["With reference to covenants entered into by owners of lands, we

(*a*) [This observation does not apply to covenants for production of title-deeds, covenants of indemnity in assignments of leases, &c., and such covenants might reasonably be held to run with the land; and there appears to be authority for making an exception in their favour at least.]

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have to consider only the *burthen* of them. Of such covenants some have relation to interests possessed or required by the covenantee independently of the covenant, such as a covenant to pay a rent-charge issuing out of the land, or to maintain a road over it; others are not connected with any such interests in the land, as a covenant by the owner of a particular close, that it shall never be built on, but always remain an open space.

Obligation of covenants.

[" Whether the burthen of such covenants of either description runs with the land, so that an action of covenant at law can be maintained against an alienee, seems to have been lately questioned. It has sometimes been considered to depend on privity of estate; that is, on the fact of the party sought to be charged having or not having the estate of the covenantor. In a case often referred to, (*Roach* v. *Wadham*, 6 East, 289, ante, Vol. 2, p. 491), the conveyance was to C. in fee, to such uses as W. should appoint, and in default of appointment to the use of W. in fee; and a rent was reserved to the grantor in fee, which W. covenanted, for himself, his heirs, and assigns that he, his heirs and assigns, would pay. Afterwards, W. sold the land, and by indentures of lease and release, C., by the direction of W., released, and W. granted and released, and also limited and appointed, the estate to the purchaser in fee. The court held, that the second conveyance operated as an appointment under the power limited to W. in the first conveyance, and that the second purchaser had not the estate of W., and therefore decided that he was not bound by the covenant for payment of the rent. The court must in that case have considered this distinction as influencing their decision, for they suffered it to be argued at great length, which would not have been necessary if the action would not lie, even supposing the defendant to have had the estate of the covenantor. It is certain that the rule of law as to this point is not very clearly laid down in the old text-books, and it may have been the intention of the judges in *Spencer's case*, and other authorities, to confine the rule to covenants entered into by lessees. There is, no doubt, ground for distinction between covenants by lessees and covenants by the owners of the fee. If the rule were to be applicable to the latter, and if covenants were to be legally binding on alienees of lands, to which they relate, we should consider that the distinction on which the case of *Roach* v. *Wadham* was decided ought to be abolished, and the burthen of the covenant ought to run, notwithstanding want of privity of estate.

tered into by owners of land.

Observations of Real Property Commissioners.

As to privity of estate.

Roach v. *Wadham.*

Rule not clearly laid down.

[" But we have been led to consider, whether there is any good reason why the burthen of covenants of any description, entered into by the owners of land, should in any case run with the land so far as concerns the legal remedy. In the case of the rent-charge or of the road, the person entitled to the benefit may secure himself in the enjoyment of it by more express remedies. Powers of distress are usually reserved (and when not reserved are given by statute) for enforcing payment of rent; trespass will lie for the interruption of a road; the addition of a remedy by action of covenant against the same persons who would be the objects of the former proceedings appears to be unnecessary. There are also cases in which the justice and policy of giving the remedy by covenant would be questionable, as, where the object to be secured is a

Proposal, that the burthen should not run with the land.

WHEN COVENANTS RUN WITH THE LAND.

rent, and the value of the land charged with it has fallen below the amount of the rent.

Obligation of covenants.

[" Upon the next class of covenants entered into by the owners of land, considerable difficulties are at present met with in practice,—we mean covenants entered into by the owners of particular land with the owners of other neighbouring or adjoining land, that the former shall not be built upon or planted on, or so as to impose other restrictions upon the mode of enjoyment of land in favour of persons taking no property in such land. An instance of a covenant of this kind is mentioned by Hale, in a note on Fitz. N. B., tit. *Writ of Covenant*, fo. 145, n., or 8th ed., p. 341. He cites the Year-book, 4 Hen. 3, c. 57, which is not in print. In modern times such covenants are of frequent occurrence in cases where the areas of squares or public walks are to be preserved, or where an uninterrupted view of the sea or of open country is to be secured to the owners of adjoining houses. Doubts, nevertheless, appear to have been extensively entertained, both as to the efficacy of such covenants for the purposes they are intended to answer, and as to their validity. With respect to the former the principal ground of doubt has been, whether they would run with the land so as to bind all successive owners of it. Judged by the usual rule (and supposing the rule to be applicable) perhaps this may be thought to be unfounded, for they relate directly and immediately to the land. If such a covenant is not binding, at least in equity, on an assignee of the land, a title to property, the enjoyment of which materially depends upon it, must obviously be defective.

Covenants by the owners of land where the covenantor has no interest beyond the covenant.

[" It does not very clearly appear under what impression as to their effect such covenants have been introduced or sanctioned by practitioners; probably they have seldom been viewed as creating at law any other than a personal obligation. We are not aware of any instance in which an action at law upon such a covenant has been brought against an assignee of the land referred to in it. In a few cases the subject has been brought before courts of equity by suit against an assignee of the land; in some of these cases the court has refused to interfere by way of injunction, but the validity of the covenant, or its binding the assignee, has never been negatived by decision.

Other contrivances for the same purpose.

[" Practitioners have, in many cases, resorted to other contrivances for attaining the same object, such as vesting the land, or a long term of years in it, in trustees, upon trust to continue it in the state intended to be guaranteed, or the creation of a rent with powers of distress and entry to arise on the taking place of any alteration in the circumstances of the land.

Objection on the ground of perpetuity.

[" It has been doubted whether covenants of this description (and still more trusts for the same purpose) are not open to the objection of creating a perpetuity. Those who consider that they are so argue that the doctrine of perpetuity is not confined to a restraint on alienation, but that it applies to every provision or engagement the effect of which may be to impede the free circulation of property in land; and they contend, that, in order to secure that freedom of alienation, land ought not to be capable of being subjected to any burthens or interests which the owner of the fee cannot discharge it from within the period of perpetuity, except rights of way, light, and water, and other easements now

acknowledged by law. We are not aware that this question has ever been discussed in any court†. In the case cited by Hale the covenant was held to be good; but this does not go far towards removing the doubt, for that case occurred at a period long before the law of perpetuity was introduced.

Obligation of covenants.

["In cases where the property is of sufficient value to bear the expense, it has been usual to obtain private acts of Parliament. It cannot be said that the judges or the Legislature, in suffering such acts to be passed, have sanctioned the doubt alluded to, because there have been in most such cases other circumstances, such as the imposition of rates and making police regulations, which require the interference of Parliament.

["To declare generally, that such covenants create continuing obligations, as well at law as in equity, against the owners of land, appears open to much objection. It might not unfrequently lead to persons being rendered liable to an obligation, or at least sued for it, where the existence of the obligation was unknown to them. A general register (which we hope to see established) would remove much of this difficulty.

Suitable remedy is in equity.

["On the other hand, a declaration, that covenants of this kind are merely personal or covenants in gross, (if it went the length of precluding the assistance of a court of equity), would be almost entirely to destroy the use of them, for in that case the benefit would scarcely survive the generation in which the obligation was created. The security, so far as regarded the damages to be recovered at law, would be dissipated and lost. The suitable remedy upon such a covenant is to enforce its specific performance, for the breach of it can seldom if ever be adequately compensated by damages. The only useful tribunal in such cases must, therefore, be a court of equity, and on the other hand in such a court alone proper weight can be given to want of notice. If it should clearly appear that a party, against whom it was sought to enforce such a covenant, was a purchaser for valuable consideration without notice of the covenant, and without any such negligence on his part as to counterbalance the want of actual notice, the court would refuse to interfere. This state of things could not happen after the establishment of a well-constructed general register, and is not likely often to occur even without such an establishment. So, if it should appear that the covenant was originally inconvenient and contrary to public policy, either as going beyond the necessity of the case in the quantity of the land covered by it, or in the nature of the restrictions imposed‡, or that, although not in the first instance open to any such objection, it had subsequently become inconvenient and objectionable on grounds of public policy, in either case the court would be at liberty to refuse its interference.

["The result of the reasoning we have gone into under this and the preceding head is, that the best mode of settling the law as to covenants entered into by the owners of land will be to declare, that, at law and for the purpose of conferring a legal right of action, the burthen of them

† [Vide infra, p. 349; Lewis on Perpetuities, 612, App. xxxv.]

‡ [Vide ante, Vol. 3, p. 458.]

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shall not be considered as running with the land; reserving the jurisdiction of equity to interfere by injunction, or otherwise, for enforcing the due performance of such covenants in all cases in which such courts may deem it proper so to do."]

Obligation of Covenants.

Brewster v. *Kidgill.*

Covenant to pay rent-charge.

[In *Brewster* v. *Kitchell, Kitchin*, or *Kidgill*, Salk. 198, 615; Holt, 175, 609; Lord Raym. 317; 5 Mod. 368; 12 Id. 166, the owner of the fee granted to E. B. and her heirs a rent-charge in fee, and covenanted for further assurance. There was a memorandum indorsed on the deed, that the rent was to be paid free from taxes. Afterwards, the grantor, for further assurance, granted and confirmed the rent with a penalty, and covenanted with E. B. and her heirs that it should be paid free from taxes. The point decided was, that this covenant bound the grantor and *his heirs* to pay the rent free from taxes *subsequently imposed*, being of a like nature with taxes previously existing. (Vide ante, Vol. 4, p. 418). But Holt, who delivered the judgment of the court, added, (12 Mod. 170), "There is another matter in which I have not consulted my Brothers, and that is, whether the terre-tenant in this case is obliged by the covenant. This is a covenant by the grantor of the rent who was seised in fee of the manor. Now who this terre-tenant is does not appear, whether he be heir or assignee; for if he be assignee, I do not think him chargeable at law; for this covenant does not run with the land. (Hard. 87). I make no doubt but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted, but that the covenant should run with the rent against the assignee of the land, I see no reason. *If this rent was granted so to be paid, it would be another matter, but here is only a covenant*, and no words amounting to a grant; and therefore there can be no relief in this case against the terre-tenant *but in equity:* and therefore for this point I do not see how the plaintiff can have his judgment, for if this covenant should charge the land it would be higher than a warrantia chartæ, which only affects the land from the judgment thereon given." But the other three judges thought that this covenant might charge the land, *being in the nature of a grant*, or at least a declaration going along with the grant, shewing in what manner the thing granted should be taken, and reckoned the indorsement as part of the deed. The action was brought on a feigned wager, so as to raise the question of right generally, and it was not necessary to decide whether the assignee could be sued in covenant. (Vide ante, p. 339). The opinion of Lord Holt, therefore, as to the covenant, was not contradicted by the other judges. (But see Wilm. Cas. 349). In Lord Raym. p. 322, the reason said to have been given by Holt is, that "it is a mere personal covenant, and cannot run with the land. Warranty, which is a real covenant, will never bind the land of the warrantor until judgment had in warrantia chartæ, (ante, Vol. 4, p. 4), much less will this personal covenant bind the land." See Holt, 175. It is difficult to collect with certainty from any of the reports, whether the objection was founded on the nature of the particular covenant, on the omission of the word "assigns," or on the general principle, that a covenant shall not bind the terre-tenant. The case of warranty obviously affords but a remote analogy. See Co. Litt. 384. b. The case in Hard. 87, 1 Eq. Ab. 26, *Cook* v. *Arundel*, cited by Holt, was not in point. There the owner of land subject to a fee-farm

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rent had granted part of the land to one under whom the plaintiff claimed, and covenanted that those lands should be discharged of the rent; upon which covenant it was held in equity that the plaintiff could not have relief against a subsequent purchaser of other part of the lands. It was no more than an ordinary and personal covenant. It is to be presumed, that the defendant had no notice of the plaintiff's purchase and the covenant with him, otherwise he was clearly liable to exonerate the plaintiff. (See *Backhouse* v. *Middleton*, 1 Ch. Ca. 173; S. C. nom. *Cornbury* v. *Middleton*, Id. 208, ante, pp. 127, 128; and see 2 Sugd. Vend. 487).]

Obligation of covenants.

Covenant of indemnity by vendor of part of lands charged with rent.

[In *Holmes* v. *Buckley*, Prec. Ch. 39; 1 Eq. Ab. 27, A., and K., his wife, being seised in right of K. of land, by indenture granted a watercourse through the land to J. H. and his heirs, and covenanted, for them, their heirs and assigns, to cleanse the same, and that all fines and recoveries to be levied or suffered should enure to confirm the watercourse according to the grant; and afterwards a recovery was had, and a deed executed, declaring the uses to be as aforesaid. The watercourse, by mesne assignments, came to the plaintiff, and the land to the defendant, who built on and much heightened the ground over the watercourse, making it more chargeable and inconvenient to repair; and, as it was alleged and in part proved, the building had much obstructed the watercourse. So the bill was for establishing the enjoyment of the watercourse, and that the defendant, and all claiming under him, might, from time to time, cleanse the same. It was objected, that the covenant being personal was not strengthened by the recovery. But the court was of opinion that this was a covenant which ran with the land and was made good by the recovery, and that, though the plaintiff, and those under whom he claimed, had for forty years cleansed the same at their own charge while it was easy to be done and of little charge, yet, since the right was plain upon the deed, and the cleansing made chargeable by the building, it was reasonable the defendant should do it, and decreed accordingly. The decision, here, was only that the contract was binding in equity on parties with notice, although the dictum certainly goes the full length of asserting that the burthen of the covenant ran with the land, and the benefit of it with the easement. It does not appear to have been noticed that the married woman under whom the lands were claimed could not covenant either by the deed or by the recovery.]

Holmes v. *Buckley.*

Covenant to cleanse watercourse.

[In *The Mayor of Carlisle* v. *Blamire*, 8 East, 486, G. D., the owner of the fee, in 1654 granted, bargained, and sold to the corporation and their successors so much of the river Caldew running through his lands as should be sufficient for the grinding of corn at all times at certain mills belonging to the corporation, at a yearly rent; and the grantor covenanted, for himself, his heirs, &c., that he, his heirs or assigns, would not divert any part of the water so granted. In an action of covenant by the corporation against an alleged assignee of the grantor's estate, it turned out that the legal estate was outstanding in a mortgagee, and on that ground the plaintiffs were nonsuited; but it seems to have been taken to be clear that the obligation of the covenant ran with the legal estate; the only question which the court treated as open was, whether a mere mortgagee would be liable, a point now settled in the affirmative. Ante, Vol. 5, p. 429.]

Mayor of Carlisle v. *Blamire.*

Covenant for enjoyment of water-right.

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Roach v. *Wadham.*

Appointees of covenantor not bound by his covenants.

[In *Roach* v. *Wadham*, 6 East, 239, ante, Vol. 2, p. 491; Vol. 4, p. 170, an undivided share of a messuage was conveyed by the plaintiffs to C. to such uses as Watts should appoint, and in default of appointment to him in fee, yielding and paying, and the said Watts and C. did grant to the plaintiffs, the yearly fee-farm rent of 28*l.* And Watts, for himself, his heirs and assigns, covenanted with the plaintiffs, that he, his heirs and assigns, would pay the rent. Watts and C. afterwards joined in a deed of release and appointment to Wadham, S., and P., and their heirs, to certain uses or trusts in favour, as to one moiety, of Wadham and his heirs. The action was brought upon the covenant of Watts against the devisee and executor of Wadham, to recover a moiety of the rent. It was contended in defence, and so decided, that the conveyance by Watts and C. operated as an appointment overreaching the estate of Watts, and not as a conveyance of that estate; so that Watts was a stranger to the estate taken by Wadham, and *consequently* his covenants did not run with that estate so as to bind Wadham. The late Lord Tenterden, who argued for the defendant, confined himself, as did the court, to the single question, whether Wadham took by appointment; it being taken for granted, that, if he took the estate of Watts, he was bound by the latter's covenants. From the report, it would appear that Lord Ellenborough, in reading the covenant by Watts, "for himself, his heirs and *assigns*," laid an emphasis on the word "assigns;" and, referring to the covenant by Wadham with Watts, to pay one moiety of the rent, his Lordship said, "The covenants in the conveyance to Wadham do not appear to us at all to militate with this construction; for had it been the intention of the parties that Wadham should take as the assignee of Watts, such covenant on the part of Wadham would have been less necessary than if he were intended to take as appointee; *for in the former case Watts would have had some security that he would not be called upon to pay this rent, arising from the circumstance of Wadham being liable to be sued by the plaintiffs.*" The case therefore is as strong an authority as any thing short of an actual decision can possibly be against the dictum of Holt, J., in *Brewster* v. *Kidgill* (*a*). See *Pitt* v. *Williams*, 2 Ad. & E. 418; 5 Id. 885, where the point was discussed, but did not arise.]

As to the obligation of covenants entered into by the releasee to uses.

[Before we part with this case, it may be worth while to observe, that Watts, the donee of the power, was not the releasee to uses. Assuming that the obligation of the covenant ran with the estate which he took by way of use, what would have been the effect if he had been releasee to uses? Would not his covenant then have been referred to his character as releasee, and have been held to run with the use, in the same manner as, we shall see, the benefit of covenants entered into with the releasee to uses runs with the uses? See, however, *Randall* v. *Rigby*, infra, p. 347.]

Barclay v. *Raine.*

[In *Barclay* v. *Raine*, 1 Sim. & St. 449, (ante, p. 96; see p. 98, n.),

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(*a*) [Mr. Smith does not give its full weight to *Roach* v. *Wadham*, when he says (1 Lead. Cas. 32) that "the question might have arisen" in it. It is evident that the case went upon the assumption, not only that the point had arisen, but that it was too clear for discussion.]

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we have seen that the question was discussed with regard to a covenant by the owner of land to produce the title-deeds relating to that land and also to other land belonging to the covenantee, and that Sir J. Leach, V. C., was of opinion that such a covenant would run with the land, that is to say, that the *burthen* of it would run with the land; for the circumstances make it evident that it was to that point that his Honor's observations were addressed.]

Obligation of covenants.

Covenant to produce deeds.

Randall v. *Rigby.*

Covenant to pay rent.

[In *Randall* v. *Rigby*, 4 Mee. & W. 130, (ante, Vol. 2, p. 22), lands were enfeoffed to R. H. and the defendant, and their heirs, to the use that the plaintiff, his heirs and assigns for ever, should receive a yearly rent of 63*l*., and subject thereto to other uses; and the defendant, by the deed of feoffment, covenanted with the plaintiff, his heirs and assigns, that the said R. H. and the defendant, their heirs, executors, administrators, and assigns, or some or one of them, would for ever pay the rent. It was held, on demurrer, that debt would not lie against the defendant alone for arrears of the annuity. It does not appear who was the feoffor, nor are the ulterior limitations stated; but Lord Abinger, C. B., during the argument, said, "The annuity is charged on lands in the hands of one person, and another person covenants to pay. The terre-tenant ought therefore to pay the annuity in the first instance, and the covenantor is not liable unless he refuses." So that it seems the defendant was not the terre-tenant; and, indeed, the decision was founded on that circumstance. In delivering judgment, Parke, B., said, "No doubt this covenant is collateral or in gross in one sense, that it does not run with the land or rent; for that, *Milnes* v. *Branch*, 5 Mau. & S. 411, is an authority; but it is also collateral in the sense that it is not a covenant to perform any direct duty, but only a collateral one, to secure payment of the rent." *Milnes* v. *Branch*, as we shall see, (infra, p. 359), is no authority at all as to the obligation of the covenant; and, as the covenantor in *Randall* v. *Rigby* was not the terre-tenant, the dictum of Parke, B., is not, as has been sometimes supposed, any authority upon the question now under consideration.]

Collins v. *Plumb.*

Covenant not to use a well to prejudice of owners of neighbouring water-works.

Inconvenience of interfering by injunction.

[In *Collins* v. *Plumb*, 16 Ves. 454, the devisees in trust of water-works at Gosport, held on a renewable lease for lives, and of a neighbouring freehold messuage, land, and well, sold and conveyed the messuage, land, and well, to the use of G. M. in fee, who, by the deed of conveyance, for himself, his heirs, and assigns, covenanted with his vendors, the trustees, (not naming their heirs or assigns), not to sell or dispose of the water from the well to the prejudice of the proprietors of the water-works, their heirs, executors, administrators, and assigns. Several conveyances were subsequently made of both properties, and the bill was now filed by the plaintiff, claiming, under a renewed lease of the water-works, to restrain an assignee of the well from supplying the inhabitants of Gosport with water from his well by means of water-carts and horses. In support of a demurrer to the bill, it was argued that the benefit of this covenant did not run with the land, and that it did not so relate to the land as to bind the assignee; but the point, that it would not run because there was no tenancy between the parties, was not raised. Lord Eldon, giving no opinion on the legal point, allowed the demurrer, on the ground that the Court could not inquire, as to each act of user, whether it was prejudicial to the owners of the water-works, and

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an injunction could not be supported without such an inquiry upon every act.]

Duke of Bedford v. *Trustees of British Museum.*

Covenant not to obstruct view, &c.

[In the case of the *Duke of Bedford* v. *The Trustees of the British Museum*, 3 Sugd. Vend., App., 57, (reported on the appeal before Lord Eldon, who held that there was no equity for relief, and declined to give an opinion on the legal question, 2 Myl. & K. 552), the point did not arise. The application was to restrain the trustees of the British Museum from infringing a covenant not to build on land in a particular manner, entered into by Mr. Ralph Montagu, a former owner of the land, at the time of the conveyance to him, with Lady Rachel Russell, the then *equitable* owner of the adjoining land. Sir J. Leach, V. C., ordered a case to be stated for the opinion of a court of law; not as to whether the covenant, if properly made, was binding on assignees, for that his Honor made no doubt of, but as to the meaning of the parties to this particular covenant; in which case the covenant should be stated as having been entered into with the trustee of the legal estate. His Honor said, "The policy of the law of England does not allow that the owner of land, when he thinks fit to part with it, is to impose any captious restraint upon the lawful enjoyment of the land; and those who seek to enforce a covenant which affects to restrain a particular lawful use and enjoyment of land must, according to the acknowledged principle of the law of England, shew that they have some interest in that restraint, and that it is not for a captious or arbitrary purpose." "The question is, whether upon the whole of this deed it does appear that these covenants have been so framed as to afford evidence of an agreement that Mr. R. Montagu entered into with lady R. Russell, and those who represented her, as being the owners of Southampton House and the lands adjoining, that he would never use this land but in the manner prescribed, to the prejudice of either the profit or the pleasure of Southampton House. *If this deed does afford evidence of such an intention to the instrument, there is a clear remedy at law against the act which is now sought to be restrained, and, as I before observed, a clear remedy in equity to restrain the commission of that act.*"]

Keppel v. *Bailey.*

Covenant by owner of iron-works to use particular railway.

[In *Keppel* v. *Bailey*, 2 Myl. & K. 517, Coop. Cas. Tem. Brougham, 298, a canal act authorized the canal company to construct certain canals and railways, and to charge certain tolls. The act authorized owners of mines, or proprietors of furnaces, within eight miles from any part of the canal, to construct auxiliary railways to the canal, in case the company, after application, refused to make them, and to charge such tolls as the company were allowed to charge on their railways, namely, 2½*d.* per ton per mile for lime and ironstone, and 5*d.* per ton per mile for other goods. The company was authorized, upon agreement with the parties interested, itself to construct such auxiliary railways, and to agree upon a toll, not exceeding 5*d.* per ton per mile, for goods of any kind. Certain landowners and iron-masters, including E. and J. Keppel, the lessees of the "Beaufort Works," formed a company, and under the powers of the act made a railroad, called "Trevil Railroad," connecting the "Trevil Quarry" with their iron-works and the canal company's railroads. In the partnership deed of the Trevil Railroad Company, E. & J. Keppel, the lessees of the Beaufort Works, covenanted, for themselves, their heirs, executors, administrators, and assigns, with the other share-

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holders, their executors, administrators, and assigns, so long as the covenantors, their executors, administrators, or assigns, should occupy the Beaufort Works, to procure all the limestone used in the said works from the Trevil Quarry, and to convey all such limestone, and also the iron-stone, from the mines to the said works along the Trevil Railroad, and to pay a toll of 5*d.* per mile for the same. E. and J. Keppel having assigned their lease to the defendants, and having commenced a new railway from the Beaufort Iron-works to lime quarries to the east of the Trevil Quarry, the bill was filed to restrain the defendants from using this railway. An exparte injunction, which had been obtained, was dissolved by Lord Brougham, C., after full argument. The equity claimed by the bill was opposed principally on these grounds—that the word "assigns" in the covenant referred to assigns not of the iron-works, but of the shares, (a construction towards which his Lordship leaned)—that the proper relief on the covenant was damages at law, or a simple account in equity—that the contract was against public policy, as being in restraint of trade, ante, Vol. 3, p. 458), and had become oppressive—that it was void as tending to a perpetuity—that it was a fraud on the canal company, and on the legislature, (a ground which his Lordship thought was alone sufficient to dispose of the case)—and that the covenant did not run with the land.]

Perpetuity.

[The question of perpetuity (which is intimately connected with the subject under discussion) his Lordship thus conclusively disposed of:—"I do not at all doubt that the enjoyment of property may be tied up, and an illegal perpetuity created by annexing conditions to grants, or by executing covenants whereby whoever happens to be in possession shall be restrained from using that which is the subject of the grant or covenant in all but a certain prescribed way; provided always, that the restraint so constituted is not reserved in favour of some other party who may release it at his pleasure; and therefore all such conditions and covenants are void if they go beyond the period allowed by law. But, if the party for whom the condition is made, or the party covenanting, has the entire power of dealing with his interest in the subject-matter, it is an obvious mistake to treat this as an instance of perpetuity, or of any tendency to a perpetuity. Thus, admitting that the owners of an estate could no more be restrained perpetually from cultivating it by supplies derived from any but one market, or from selling its produce at any but that market, than they could be restrained from selling the estate; and admitting that the one would be as much a breach of the rule against perpetuity as the other; it would be no such violation, nor would it in any way defraud that rule, if the owner of the estate were restrained from buying and selling at any market save that belonging to a certain party, entitled by grant or covenant to the privilege, and which he might, at his pleasure, vary or extinguish. Upon other grounds such a restraint may be objectionable and void in law as well as bad in policy, but certainly not upon the doctrine of perpetuity, any more than a right of way or other easement which the owners of an estate may enjoy over the close of another, or a rent issuing out of an estate, and which may nearly absorb its profits. The easement and the rent are the property in question, and they are free."]

[Upon the question whether the covenant ran with the land, his

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Lordship said, "Between the estates of the occupiers of the three iron-works, and the estates or the persons of their associates in the railway speculation with whom they covenant, there is no privity, no connexion whatever, of which the law can take notice. There is no relation at all in point of fact, any more than in point of law. There was no unity of title in the estates of the contracting parties: the iron-works and the lime-pits, or railway, did not come to them severally from the same owner. They were not held by them severally under the same landlord. But what is of more importance, inasmuch as it is by no means clear that even the kinds of privity I have mentioned would suffice, the parties did not stand in the relation of lessor and lessee towards each other; and there is, therefore, no reversionary interest now in the covenantees, to which the right claimed against the assignees of the covenantors may be annexed; and those assignees are called upon to perform the covenants solely in respect of the estate which they have purchased, and in respect of persons who, except under that covenant, have no connexion whatever with the estate."]

["Consider the question first upon principle. There are certain known incidents to property and its enjoyment; among others, certain burthens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner, all which incidents are recognised by the law. In respect of possession, the property may be in one, while the reversion is in another: in respect of interest, the life estate in one, the remainder in tail in a second, and the fee in reversion in a third. So, in respect of enjoyment, one may have the possession and the fee-simple, and another may have the rent issuing out of it, or the tithes of its produce, or an easement, as a right of way upon it, or of common over it. And such last incorporeal hereditament may be annexed to an estate which is wholly unconnected with the estate affected by the easement, although both estates were originally united in the same owner, and one of them was afterwards granted by him with the benefit, while the other was left subject to the burthen. All these kinds of property, however—all these holdings, are well known to the law, and familiarly dealt with by its principles. But it must not, therefore, be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient, both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of a public as well as of a simple nature; and no one who has the premises can be ignorant of what all the vicinage knows. But if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to

take coals from a certain pit, while a third may load his property with further obligations to employ one blacksmith's forge, or the members of one corporate body in various operations upon the premises, besides many other restraints, as infinite in variety as the imagination can conceive; for there can be no reason whatever in support of the covenant in question which would not extend to every covenant that can be devised."]

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["The difference is obviously very great between such a case as this and the case of covenants in a lease, whereby the demised premises are affected with certain rights in favour of the lessor. The lessor or his assignees continue in the reversion while the term lasts. The estate is not out of them, although the possession is in the lessee or his assigns. It is not at all inconsistent with the nature of property that certain things should be reserved to the reversioners all the while the term continues: it is only something taken out of the demise, some exception to the temporary surrender of the enjoyment. It is only that they retain more or less partially the use of what was wholly used by them before the demise, and what will again be wholly used by them when that is at an end; yet, even in this case, the law does not leave the reversioner the absolute license to invent covenants which shall affect the land in the hands of those who take by assignment of the term. The covenant must be of such a nature as 'to inhere in the land,' to use the language of some of the cases; or 'it must concern the demised premises and the mode of occupying them,' as it is laid down in others; 'it must be quodammodo annexed and appertaining to them,' as one authority has it; or, as another says, "it must both concern the thing demised, and tend to support it, and support the reversioner's estate. Even the lessor, the continuing owner, is confined within certain limits by the view which the law takes of the nature of property, and if, beyond those limits, he were to imagine a stipulation, the covenant in which he should embody it would not run with the land."]

["It only requires a little attention to the cases to satisfy us, first, that, even where the privity of lessor and lessee exists, there are bounds so narrow to the province of real covenants, as would make the one in question lie on the extreme verge of it, if it did not fall without it; secondly, that there can be no doubt of such a covenant being one personal, collateral, or in gross, where there does not exist that or some other privity of estate, which, according to one or two of the authorities only, and those I venture to doubt, has been held to render real covenants what would otherwise have been personal; and, thirdly, that those covenants which have been held real, *excepting, indeed, such as relate to title,* would have been deemed collateral, had there been no privity in respect of reversion or other unity of title." After reviewing many of the cases as to the transmission of the *benefit* of a covenant to assignees, and as to the nature of the covenants between lessor and lessee, which will bind the assignee of the lessee or enure to the benefit of the assignee of the reversion, cases which do not affect the present question, his Lordship proceeded:—

As to privity of estate.

["A careful examination of the authorities, then, confirms the view which I set out with taking of the subject upon principle, and shews that there would be considerable difficulty in holding such a covenant

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as the one in question to run with the land, even if there existed between the original parties to it that privity which the enuring right of reversion creates between the lessor or his assigns and the assigns of the lessee; that the cases taken altogether, and sifted, are adverse to such a covenant being real and inherent even in that case of privity; but that, where no such privity can be pretended to exist, as in the present instance, the covenant is plainly collateral, and binds not the assignees."]

["If such would be its construction at law, does the notice which the purchaser had of its existence alter the case in this Court upon an application for an injunction? or would it upon the application, of a correlative and co-extensive nature, for a specific performance? Certainly not. The knowledge by an assignee of an estate, that his assignor had assumed to bind others than the law authorizes him to affect by his contracts,—had attempted to create a real burthen upon property which is inconsistent with the nature of that property, and unknown to the principles of the law,—cannot bind such assignee by affecting his conscience†. Observe how this would apply to all assignments of leaseholds. Every assignee of a lease has notice of the lessor's covenants, consequently no covenant, how absurd soever, could be made by a lessee that would not of necessity run with the land in equity, into whose hands soever the land might come; and all the decisions which have been made by the courts, with respect to such covenants being collateral or in gross, would be of no avail." See *Hemingway* v. *Fernandes*, infra, p. 353.]

Whatman v. *Gibson.*

Covenant not to carry on certain trades.

[In *Whatman* v. *Gibson*, 9 Sim. 196, J. Fleming, being seised in fee of a piece of ground, made an indenture, dated in 1799, between himself and W. P. and G. G., and such other persons as should at any time execute the indenture, by which, after reciting that Fleming had divided the land into lots for building a row of houses, and declaring that, for the purpose of preserving uniformity, it should be a general and indispensable condition of the sale of all or any part of the land, that the proprietors for the time being should observe the stipulations thereinafter contained, each of them, the said Fleming, W. P., G. G., and the other executing parties, for himself and herself, and for his or her heirs, executors, and administrators, covenanted with the other and others of them, and the several heirs, administrators, and assigns of the other and others of them, mutually, that the buildings to be erected should be built in a certain specified manner, and that none of the proprietors for the time being of any of the lots should allow certain trades to be carried on. Fleming subsequently sold and conveyed one of the lots to H. Cull, and the conveyance to him contained a recital that he had already executed the deed of 1799, (which it appeared, however,

† [The analogy wholly fails. The obligation of a contract or covenant for sale does not run with the land at law; it does run with the land in equity against all persons having notice. The title to equitable relief is entirely independent of the legal title; either may exist, though the other does not. See 2 Sugd. Vend. 504, and the cases cited in the text.]

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he had not done), who sold and conveyed it to the plaintiff, subject to the stipulations in the deed of 1799. The bill was filed against the owner of another lot, claiming under a similar conveyance from Fleming and an undertenant, both having notice of the stipulations in question, to restrain them from carrying on one of the prohibited trades in a house built on their lot. It was insisted that the covenants were against public policy, and did not run with the land, both because they were in their nature collateral, (but see ante, Vol. 4, p. 426), and because the plaintiff had no reversion or interest in the defendant's land. Sir L. Shadwell, V. C., granted an injunction, expressing no opinion on the legal rights of the parties, but said, "I see no reason why such an agreement should not be binding in equity on the parties so coming in with notice." As to the legality of such agreements, see also *Rankin* v. *Huskisson*, 4 Sim. 13,—a case on an agreement by the intended lessors; and see *Squire* v. *Campbell*, 1 Myl. & Cr. 459.]

Schreiber v. *Creed.*

Covenant not to build in a certain manner.

[In *Schreiber* v. *Creed*, 10 Sim. 9, the circumstances were very similar to those in the last case, but the Court held that the covenant in question did not apply to the state of facts before the Court. (See *Roper* v. *Williams*, Turn. & R. 18). Referring, however, to a covenant by J. Pitt, the owner of the fee, with the purchasers of various sites of houses, that the vendor, his heirs, and assigns, would keep in repair the lawns, promenades, &c., adjacent thereto, and of which he retained the ownership, Sir L. Shadwell, V. C., said, "It is quite plain, therefore, that a mode of dealing with the land which would go directly to destroy those lawns, promenades, &c., could never be permitted; because any one of the persons, parties to the deed, might have a remedy, *as well by action of covenant* as by bill in equity, to restrain Mr. Pitt, his heirs, or *assigns*, from any general dealing with the land which would have the effect of destroying those promenades and plantations."]

Hemingway v. *Fernandes.*

Covenant by lessee of colliery to use a particular railway.

[In the case of *Hemingway* v. *Fernandes*, 7 Jurist, 888, the question was again discussed, but not decided. There the plaintiff and J. Lee, being owners of certain lands and wharfs, by deed agreed to grant to J. C. Harter and W. Harter, who were lessees of adjoining collieries, a lease for twenty-one years of so much of the lands as should be necessary to form a railway for the transmission over the said lands of all such coal as should, during the term, be gotten from the said collieries, or from any other ground in the township of S. The Harters, by the same deed, for themselves, their executors, administrators, and assigns, covenanted to pay the lessors, their heirs and assigns, an acreage rent for the ground taken up by the railway, and also, "such further rent or sum not exceeding 2*d.* for every ton of coal which shall be gotten or worked in or from the said colliery, or any other lands in the said township of S., and which shall be carried or conveyed upon the intended railway." And it was further covenanted, that, after the railway should be made, the Harters, their executors, administrators, and assigns, would, at all times during the term, carry all such coal gotten from the said collieries, or the said township of S., as should be intended to be shipped, upon the said railway to the wharfs of the lessors. No further lease was executed. The Harters made the railway, and assigned it, and also their collieries, to the defendants, who covenanted with them to make the stipulated payments. The defend-

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ants having conveyed part of the produce of their mines for shipment by a different route, the bill was filed for an account, and a specific performance of the agreement as to using the railway, which the Vice-Chancellor granted, on the express ground that the word "assigns" in the covenant meant assigns of the demised premises, so that the case fell within the second resolution in *Spencer's case*, and the defendants were bound as such assigns. The stipulation was in the nature of a reservation of rent. The defendants, being mere assignees of the agreement, could not be in a worse position than assignees of an actual lease, and therefore the Court would not order them to take a lease.]

Result of the cases.

[The result of the foregoing examination of the cases is very unsatisfactory. It will have been seen that, in none of them, with the exception of *Keppel* v. *Bailey*, (some of the dicta in which case are quite irreconcileable with the other authorities), was it even suggested that the burthen of a covenant cannot, under any circumstances, run with the land unless the covenantor fills the character either of reversioner or lessor to the covenantee. None of the cases amounts to a decision on the point. The dictum of Lord Holt, in *Brewster* v. *Kidgell*, (ante, p. 344), that the covenant of the grantor of a rent-charge will not bind the assignee of the land, is not supported by the authority on which that Judge relied; and was assumed to be erroneous, both by the counsel and by the Court, in *Roach* v. *Wadham*, (ante, p. 346). It is also opposed by the cases of *Holmes* v. *Buckley*, and *The Mayor of Carlisle* v. *Blamire*, (ante, p. 345), in which it was assumed that the terre-tenant would be bound by covenants with the grantee of a watercourse. (See *Flight* v. *Glossop*, 2 Scott, 220). And we have the dictum of Sir J. Leach, with reference to *Barclay* v. *Raine*, (ante, p. 98), that a covenant for production of title-deeds will bind the assignee of the land to which they relate; and the authority both of that learned Judge and of Sir L. Shadwell, in the cases of *The Duke of Bedford* v. *The British Museum*, *Whatman* v. *Gibson*, and *Schreiber* v. *Creed*, (ante, pp. 348, 352, 353), that the obligation of a covenant with the owners of lands not to use adjoining lands in a specific manner, may bind the assignee. The statute 32 Hen. 8, as we have seen, throws no light on this question.]

Covenantor should not have power of appointment.

[Assuming that the burthen of a particular covenant will run with the land, it is clear that an assignment under the Statute of Uses will pass it, (infra, p. 362), but that those persons only will be bound who take the estate of the covenantor. Consequently, if it is desired securely to annex such a covenant to the land, it will be necessary to put it out of the power of the covenantor to defeat his own estate to which the covenant is annexed, as in *Roach* v. *Wadham*, by exercising a power of appointment; which will be done by abstaining from giving him any such power, (but see a suggestion, ante, p. 346); or if he already possesses the power, by requiring him to put an end to it, by exercising it in his own favour previously to entering into the covenant.]

When assignees take the benefit of covenants.

[Next, as to the cases in which assignees may sue upon covenants. Covenants in leases for lives or years are now regulated by the statute 32 Hen. 8, c. 34. (Ante, Vol. 4, p. 421). The recital in the preamble to that statute, that "no stranger to any covenant, action, or condition shall take any advantage or benefit of the same, by any means or ways

in the law, but only such as be parties or privy thereunto, by the reason whereof as well all grantees of reversions as also &c. be excluded to have any entry or action against the said lessees and grantees, their executors or assigns, which the lessors might by the law have had," &c., if taken to prove that in no case did the benefit of covenants run with the reversion at the common law, would at once furnish a conclusive answer to the present inquiry; for if an assignee of a reversion cannot sue, à fortiori, must an assignee be disabled from suing where there is no such privity between the parties as that of reversioner and tenant. The recital of the statute, however, is so inaccurately penned, that it is extremely difficult to say what was the exact proposition intended to be laid down. As an authority against the right of assignees of reversions &c. to sue on covenants in any case, (as, for instance, upon implied covenants; and see 1 Roll. Rep. 80; Rol. Ab. 521; Bro. Ab. *Cov.* 5, 17, 32, 39; 2 Lev. 206; 3 Mod. 338; 1 B. & Cr. 414), it clearly cannot be supported; and there is nothing in the books to shew in what qualified sense it is to be understood †. It must be admitted that there are many dicta in support of the conclusion drawn by the distinguished editor of Wms. Saund. (240 *a*, n. (*o*)), "that, at common law, covenants ran with the land, but not with the reversion;" and this principally, as was said by Lord Ellenborough in *Isherwood* v. *Oldknow*, "because, if they did, the provision of the stat. Hen. 8 would have been in a great degree unnecessary." In none of the cases, however, was the point in the least degree material to the decision. The dictum in *Thrale* v. *Cornwal*, 1 Wils. 165, cited by Serjeant Williams, was uttered by the counsel, and not by the Court; and, in *Baker* v. *Damer*, 3 Mod. 338, the Court admitted, that, "at the common law, an assignee of a reversion might have maintained an action of covenant for any thing agreed to be done upon the land itself." See S. C., Show. 191, and per Coke, J., *Athowe* v. *Heming*, 1 Roll. Rep. 81.]

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Reversioners.

[The better opinion seems to be, that the benefit of all covenants relating to the land, and entered into with the owner of any estate in the land, whether upon the conveyance to him and by the party conveying, or by a mere stranger, and after the estate has become vested in the covenantee, will run with that estate. Where the covenant is entered into by the grantor with the grantee at the date of the grant, this is not disputed.]

Benefit of covenants with the owner of the land and relating to it will run with it.

[Thus, in *Middlemore* v. *Goodale*, Vin. Ab. *Covenant* (K.) 6; Cro. Car. 503, where the defendant, by indenture, enfeoffed J. S. of lands, and covenanted, for himself and his heirs, with the feoffee, his heirs and assigns, to make further assurance on request, which lands J. S. conveyed to the plaintiff, it was held that the latter might sue for breach of the covenant, in that the defendant did not levy a fine on the plaintiff's request. Judgment was finally given for the defendant on another ground. Id. Cro. Car. 505. And the covenant will run with the land, though it

Middlemore v. *Goodale.*

Covenant for further assurance.

† [The recital in the stat. Hen. 8, so far as it relates to conditions, is undisputed; a covenant may amount to a condition, and may not the statute have been thus generally worded in order to include conditions informally expressed in the shape of covenants, &c.? Lord Coke, in the passage where he treats of this act, confines his announcement of the proposition to conditions. See 3 T. R. 401, where Lord Kenyon appears to confound conditions with covenants.]

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relates only to a term of years; as in *Noke* v. *Awder*, Cr. El. 373, 486, where lessee for years having assigned his term by deed to A., with covenant for quiet enjoyment, and A. having assigned to the plaintiff by parol, all the Court agreed that the assignee should have an action of covenant without shewing any deed of assignment, for it was a covenant which ran with the estate. But the decision was ultimately pronounced for the defendant on another ground. And these authorities were followed in the modern case of *Campbell* v. *Lewis*, 3 B. & Al. 395, (in error, affirming *Lewis* v. *Campbell*, 3 J. B. Moore, 35), which was an action by a second assignee of part of the premises comprised in a lease, against the lessee for breach of his covenant for quiet enjoyment, the landlord having entered upon a forfeiture incurred by the defendant. So, in *Kingdon* v. *Nottle*, 4 Mau. & S. 53, it was held, on demurrer, that covenant would lie by a devisee of lands in fee upon the covenants for title, &c., entered into by the defendant with the plaintiff's testator, and that, though broken at the time of the conveyance, it was a continuing breach in the time of the devisee. See S. C. 1 Mau. & S. 355. In *King* v. *Jones*, 5 Taunt. 418; 1 March. 107, it was held that the heir might sue on a similar covenant entered into by a stranger to the legal estate. "It was admitted," said Heath, J., "that this is a covenant which runs with the land." See, however, S. C., decided in error on a narrower ground, *Jones* v. *King*, 4 Mau. & S. 188. See *Orme* v. *Broughton*, 4 Moo. & Sc. 417.]

Campbell v. *Lewis.*

Assignee of part of leasehold premises.

Kingdon v. *Nottle.*

King v. *Jones.*

Whether covenants with the owner of the land by a stranger will run with the land.

["Expressions found in some books would lead to the opinion, that, in considering this class of covenants with reference to the *benefit* of them, there is a distinction between those cases where the covenantor is a party by whom the estate is, or has been, conveyed, and those in which he is a stranger to the estate. We think the authority of Lord Coke, on this point, (which is express, Co. Litt. 384. b.), sufficient to warrant us in disregarding this distinction." Third Real Prop. Rep. p. 52. See 2 Sugd. Vend. 472, contrà.]

Sir J. Leach, M. R., we have seen, seems to have thought that the benefit of a covenant to produce title-deeds, entered into by a stranger, would run with the land, (ante, p. 98); or, at least, that such would be the effect if the covenant were by a purchaser with his vendor, who had parted with the deeds, but retained part of the estate. Such a case, indeed, seems to be wholly undistinguishable in principle from the present; for, in regard to the land *not sold*, to which alone the covenant in question relates, the parties are strangers to each other. The doctrine then, of the learned Judge would seem to involve the conclusion, that a covenant entered into *by a stranger* with the owner respecting the land runs with it. If such a general proposition could be maintained, it would go far towards overturning some of the notions which have obtained in the profession respecting covenants running with the land. According to these notions, privity of estate must subsist between the covenanting parties, for which purpose it has been deemed essential that the covenantor and covenantee should stand in the relation of grantor and grantee of the lands to which the covenants relate; but what *privity of estate*, it may be asked, subsists between the parties in such a case? As applied to the relation of reversioner and lessee, the term has a clear and intelligible meaning, but has no very obvious application to the case of a grantor who parts with his whole estate, and who ceases to have an in-

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terest in, and is, therefore, a stranger to, the land at the instant that it vests in the grantee. In support of the hypothesis in question, much stress has been laid on what fell from Lord Kenyon in *Stokes* v. *Russell*, 3 T. R. 402, where his Lordship says—"It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, *there must be privity of estate between the covenanting parties.*" But it is to be observed, that the question before the Court in this case was not, whether a covenant entered into *by* a stranger with a person having an estate in the land, could run with it, but whether a covenant by a lessee *with* a stranger to the reversion was annexed to that reversion. The fact was, that a mortgagor and mortgagee had joined in granting a lease, and the lessee's covenants were made with the mortgagor, who had no estate, and which were, therefore, held to be, as they obviously were, covenants in gross. Lord Kenyon's continuing remarks are explicitly pointed to such a case:—"The covenantee," said his Lordship, "had no interest in the land of which a court of law could take notice, though he had an equity of redemption, an interest which a court of equity would take notice of. These, therefore, were collateral covenants. And though a party may covenant with a stranger to pay a certain rent in consideration of a benefit to be derived under a third person, yet such a covenant cannot run with the land."

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Stokes v. *Russell.*

Opinions of Lord Kenyon and Lord Coke on the point examined.

The case, therefore, (and the dictum must be taken secundum subjectam materiam), left wholly untouched the doctrine respecting the annexation to the land of covenants entered into by a stranger with the owner of the land. One of the cases put by Lord Coke as an instance of a covenant running with the land, is certainly of this description:—"A., seised of the manor of D., whereof a chappell was parcell, a prior, with the assent of his convent, covenanteth by deed indented with A. and his heires to celebrate divine service in his said chappell weekely for the lord of the said mannor, and his servants, &c. *In this case the assignees shall have an action of covenant*, albeit they were not named, *for that the remedie by covenant doth runne with the land*, to give dammages to the partie grieved, and was in a manner appurtenant to the mannor†. But if the covenant had been with a stranger to celebrate service in the chappell of A. and his heires, there the assignee shall not have an action of covenant; for the covenant cannot be annexed to the mannor, because the covenantee was not seised of the mannor." Co. Litt. 384. b.

Lawrence Pakenham's case.

In this case, it is clear, there was no privity of estate (using that term in the sense which, in the cases under consideration, has been given to it) between the prior and the lord of the manor; and the reason assigned by the very learned commentator for the distinction between the two cases which he puts in opposition, shews that he considered it sufficient that the covenant was with the owner of the land, respecting the land. The whole difference is made to consist in the covenantee being, or not being, seised of the manor, without regard to the relative character of the covenantor. We have, therefore, the high authority of Lord Coke, uncontradicted, I believe, by decision, though certainly opposed by the current of professional opinion, in favour of the doctrine in question; and

† [2 H. 4, 6, *Hen. Horne's case;* 6 H. 4, 1; 5 Rep. 17, 18, *Spencer's case;* 6 Vin. 392. See Bro. Ab. *Cov.* pl. 15; 2 Bos. & P. 568, n.; 2 Sugd. Vend. 473; *Anon.* Moore, 179, pl. 318, stated ante, Vol. 4, p. 162, n.]

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when to this is added the weighty consideration of convenience, (which would seem obviously to demand that covenants relating to the land, *by whomsoever made*, should accompany the land), we may well entertain a doubt whether the courts would not now hold that covenants for title, to produce title-deeds, and all other covenants capable in their nature of running with the land, if made with any person having an estate in the land, would be annexed to that estate in the hands of an alienee.

Case of the co-parceners.

[It hath been adjudged, that where two co-parceners made partition of land, and the one made a covenant with the other to acquit her and her heirs of a suit that issued out of the land; the covenantee aliened; in that case the assignee shall have an action of covenant, and yet he was a stranger to the covenant, because the acquittal did run with the land, (42 E. 3, b.) Co. Litt. 384, b. As co-parceners have not any unity of seisin, this case seems to be an authority in favour of the proposition here contended for*.]

Raymond v. *Fitch.*

Covenant by lessee not to fell excepted trees.

[In *Raymond* v. *Fitch*, 2 Cr. M. & R., Lord Abinger, C. B., in delivering the judgment of the Court of Exchequer, that an executor of a lessor, who was owner of the fee, might sue the lessor on a breach of his covenant not to fell timber trees excepted out of the demise, committed in the testator's lifetime, said, "There is no doubt but that the covenant in question is purely collateral, and does not run with the land; for the trees being excepted from the demise, the covenant to fell them is the same as if there had been a covenant not to cut down trees in an adjoining estate of the lessor. It is a security by specialty, given by the lessee to the lessor, not to commit such a trespass during the lease, which may continue beyond the lessor's life. For the breach of such a covenant, after the death of the covenantee, the heir, or devisee of the land on which the trees grew, could not sue." This dictum, which was not necessary to support the decision, may well be doubted, and the decision itself seems to be irreconcileable with the case of *Vyvyan* v. *Arthur*, 1 B. & Cr. 410, where the owner of lands and of a mill leased the former to A., his executors, &c., for years, yielding and paying to the lessor certain money rents, "and also doing suit to the mill of the said lessor, his heirs and assigns, called T. mill, by grinding all such corn there as should grow in or upon the close thereby demised during the said term." The lessor devised the reversion, and also the mill, to the use of the plaintiff for life, and it was held, that he might maintain covenant against the lessee on the reservation of suit to the mill. The Court relied on *L. Pakenham's case*, 42 E. 3, ante, p. 357. Bayley, J., said, "An action at the suit of the assignee of the reversion is maintainable in some cases at common law, in others under the stat. 32 Hen. 8. I rather think that this case belongs to the former class. It is not necessary for us to decide what the case would be, if the ownership of the land demised, and the mill had been severed: here, the lessor continued owner of the reversion of the demised premises and of the mill from the

Vyvyan v. *Arthur.*

Covenant to resort to a particular mill.

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* [In *Mayor* v. *Steward*, 4 Burr. 2446, in deciding that the covenant by an assignee of a lease to indemnify his assignor, (who, being joint tenant with him, had released his interest), was not discharged by the bankruptcy of the latter, the Court said, that this was the bankrupt's own express collateral covenant, not a covenant that runs with the land. But the dictum was entirely extrajudicial.]

time of granting the lease till the time of his death, and the plaintiff, as his devisee, then became entitled to both, and now continues so. *My judgment is founded entirely on the unity of title to the reversion of the land demised and the mill.*" This case is, at least, no authority against the right to sue on such a covenant, where the parties do not stand in the relation of landlord and tenant.]

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[Another question, which has been a subject of controversy, is, whether the benefit of covenants will run with an incorporeal hereditament. In *Bally* v. *Wells*, Wils. 346, (ante, p. 339, n., and Vol. 4, p. 252), it was decided, that the obligation of a covenant by a lessee of tithes would bind an assignee, and the Court decided the case on the ground, that, having once got rid of the idea of matter, there was no difference, for this purpose, between a corporeal and an incorporeal hereditament. So, in *Brewster* v. *Kidgell*, (ante, p. 334), the action was brought by the heir of a grantee of a rent-charge, and Holt, J., said, "I make no doubt but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted." The case of *Milnes* v. *Branch*, 5 Mau. & S. 411, has been generally regarded as an authority against the position. The case, however, does not go quite so far. There land had been conveyed to Hope and Barnsley, their heirs and assigns, as to one moiety, to such uses as Hope should appoint, and in default of appointment, after his decease*, to the use of his heirs, with like uses as to the other moiety in favour of Barnsley, and subject to a rent of 42*l.* payable to the releasors. Hope subsequently appointed his moiety to Barnsley and Robinson, and the heirs of Barnsley, in trust as to the estate of Robinson for Barnsley and his heirs. Barnsley having contracted to sell the entirety to the defendant Branch, subject to a rent-charge of 86*l.*, by indenture, appointed one moiety to Branch and Jackson, their heirs and assigns†; and for further assuring that moiety, and to convey the other moiety, Barnsley and Robinson enfeoffed Branch and Jackson, and the heirs and assigns of Branch, of the entirety, habendum to Branch and Jackson, their heirs and assigns, to the use that Barnsley and Robinson, their heirs and assigns, might receive (to the use of Barnsley and Robinson, and the heirs and assigns of Robinson, but as to the estate of the latter in trust for Barnsley) a rent-charge of 86*l.*, with powers of distress and entry, and subject thereto to the use of Branch and Jackson, and the heirs and assigns of Branch: and Branch for himself, his heirs, executors, and administrators, covenanted with Barnsley and Robinson and the heirs of Barnsley, that he, his heirs or assigns, would pay the rent, and also would, within one

Whether benefit of covenants runs with incorporeal hereditaments.

Bally v. *Wells.*

Brewster v. *Kidgell.*

Milnes v. *Branch.*

* [There is, perhaps, an omission in this part of the report.]

† By this inaccurate mode of limitation, it is clear that the use was executed in C. and D., contrary to the intention of the parties, and the limitations over, including the rent, in respect of the moiety, conferred equitable interests only. No error more frequently strikes the eye of the conveyancing practitioner in the perusal of titles than that of parties unintentionally vesting the legal estate in an improper person, by attempting, in an appointment under a power, or a bargain and sale enrolled, to convey to one person to the use of another, instead of limiting the lands immediately to the intended cestui que use.

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year, execute certain buildings, and maintain or re-erect them for ever. Barnsley and Robinson, within the year, demised the rent to the plaintiffs for 1000 years, who brought the present action against Branch for breaches of the covenants to pay the rent and to build. A demurrer was allowed. The above dictum of Lord Holt was cited. Lord Ellenborough, C. J.—"I am inclined to think, that the language of Lord Holt as to the right of the assignee of the rent to have covenant was extrajudicial; and, putting aside that dictum, I do not find any authority to warrant the position that this covenant runs with the rent. I do not see how the analogy, as it regards covenants which run with the land, is to be applied, unless it be shewn that this is land; it might as well be applied to any covenant respecting a matter merely personal. The stat. Hen. 8 recites, that at common law such only as are parties or privies to any covenant can take advantage of it; here is neither privity of contract nor privity of estate. The rent is reserved out of the original estate." Bayley, J.—"I am entirely of the same opinion. The argument of the plaintiff loses sight of the conveyance by which this rent is created. It is incorrect to state it is a rent-charge granted by the owner of the fee; it being a conveyance in fee by Barnsley and Robinson to the defendant to certain uses, one of which is that they shall receive the rent; so that the rent arises out of the estate of the feoffors. It is, therefore, not a grant by the owner of the fee, and the covenant is a covenant in gross."]

Remarks upon the case of *Milnes* v. *Branch.*

[This case is exceedingly unsatisfactory, and not the less so because the grounds of decision stated by the two learned Judges who delivered their opinions are different. Lord Ellenborough seemed to rely on a distinction between land and rent, as if the latter were no more than a personal chattel.] Though these observations of his Lordship may seem to imply a doubt, whether the grantee of the rent could in any case maintain an action for it, yet the decision can hardly be taken as an authority to this extent. A rent is an incorporeal hereditament, and there seems to be no reason why a covenant should not run with it, as well as with any other species of real estate. The affirmative, indeed, has been expressly decided as to tithes, on the construction of the stat. 32 Hen. 8, c. 34, (stated post), on the ground that there was no distinction between land and incorporeal hereditaments, in regard to the annexation of covenants; *Bally* v. *Wells*, 3 Wils. 25; Wilm. Cas. & Op. 341: and it was assumed in the case of *The Earl of Portmore* v. *Bunn*, 1 B. & C. 694; 3 D. & Ry. 145, that a covenant would run with any incorporeal hereditament. A contrary doctrine would render covenants for title in grants of advowsons, tithes, and other incorporeal hereditaments, merely covenants in gross.

[Bayley, J., founding his judgment on the circumstance that the rent was created before the estate reached the covenantor, seemed to admit that the result would have been different if the covenantor, being seised, had himself granted the rent. But it is difficult to perceive the ground of such a distinction. Every analogy points the other way. It seems to be clear, that, in the case of land, the assignee may sue on the covenant of a stranger; and it is settled, that, under the statute of Hen. 8, if the lessor bargain and sell the reversion by deed indented and inrolled, the bargainee is not in the *per* by the bargainor, and yet he is an assignee within the statute. So, if the lessor grant the

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reversion to the use of A. and his heirs, it is a sufficient assurance within the statute, because he comes in by the act and limitation of the party, albeit he is in the *post*, and the words of the statute be *to or by;* and they be assignees to him, although they be not by him. Co. Litt. 215. a. See *Isherwood* v. *Oldknow*, 3 Mau. & S. 382, that a remainderman is an assignee of the reversion on a lease made by the tenant for life under a power. Had the distinction been taken as a ground for holding that the *obligation* of the covenant by Branch did not run with the land, it would have been more intelligible. Certainly, if the subject would admit of such refined consideration, it might, in one sense, be difficult to frame any covenant by a stranger to a rent-charge, and to the land out of which it issued, so as to bring it within the definition of a covenant touching or concerning the hereditament in question. A covenant to pay the rent would not concern it, because the payment, if made, would not be *that rent;* and a covenant for assurance of the rent would seem to be equally irrelevant. But it is clear that an assignee of a reversion may sue the lessee in covenant after he has assigned, and the lessee has accepted the assignee. (*Matures* v. *Westwood*, Cro. El. 617; *Brett* v. *Cumberland*, Cro. Jac. 521; *Ashurst* v. *Mingay*, Show. 133). And yet in this case anything that the lessee could be obliged to perform under the covenant would be collateral to the land, quite as much as in the case of the rent-charge. That this is by the statute is immaterial to the illustration, because it is settled that the statute does not extend to collateral covenants. *Webb* v. *Russell*, 3 T. R. 395.]

[In *Milnes* v. *Branch*, if the appointment by Barnsley operated, Branch and Jackson were seised of one moiety as joint-tenants in fee, and of the other moiety as joint-tenants for their joint lives, with the fee in Branch; if it did not operate, then the latter limitation took effect at law as to the entirety. On the other hand, Barnsley and Robinson took a legal rent, as joint-tenants in fee, and (if the appointment operated) out of a moiety only of the land. The covenant was by Branch alone, and with Barnsley and Robinson, and the heirs of Barnsley. In either view the seisin of Branch extended to the entirety of the land out of which the rent issued, so that the case could not be rested on the distinction, that, as a rent-charge cannot be released as to part of the land, so it cannot have a covenant running with it only in respect of part of the land.]

Practical suggestion as to mode of granting rent-charge.

A practical suggestion, arising from the cases of *Milnes* v. *Branch* and *Roach* v. *Wadham*, is that where a fee-farm rent is intended to be granted, which is to be accompanied by a covenant for payment, the grant should be simply of a rent-charge; and in this, as in every case where it is intended that the burthen of a covenant should run with the land, the owner of the inheritance of the land who enters into the covenant should, on alienating the land, if he has both a power and an estate, convey by virtue of his ownership, and not execute his power. An effectual mode of insuring this would be to make him appoint to himself in fee, previously to his granting the rent; or, if the covenant to pay be contained in the deed conveying the property to him, he should be required either to take the conveyance of the legal estate to himself as releasee to uses (vide ante, p. 346), or to take a limitation of the use simply to himself in fee.

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When covenants pass to the cestui que use.

Bascawin v. *Cook*, *Cook* v. *Herle*.

Rent-charge.

[We have seen, in the passage cited from Co. Litt. p. 215. a.; ante, p. 360; and see 3 Leon. 225; Moo. 97, that an assignee of a reversion, claiming under a bargain and sale under the statute, or under a grant to his use, is such an assignee as may have the benefit of covenants under the stat. of Hen. 8. It is also clear, that generally the benefit of covenants entered into with a releasee to uses, will pass to the cestui que use, and that an assignee through the Statute of Uses is in the same position as an assignee by a common-law assurance. In *Bascawin* v. *Cook*, 1 Mod. 223; *S. C.* nom. *Cook* v. *Herle*, 2 Mod. 138, T. C. granted a rent-charge to B. and H. for the life of Mary Cook, habendum to them, their heirs and assigns, ad opus et usum of Mary*, and covenanted to pay the rent ad opus et usum Mariæ. It was held that an action by B. and H., assigning for breach that the rent was not paid to them, ad opus &c., was well brought. The Court said, that the use was executed in Mary, under the general provisions of the Statute of Uses; but that "when the statute transfers an estate, it transfers together with it such remedies only as by law are incident to that estate, and not collateral ones; and took a distinction between the power of distress, which, they said, was transferred by the statute, and the remedy on the covenant, which was not either transferred or discharged. In 1 Mod., however, we find, per Atkins, J., "There is a clause in the stat. of 27 Hen. 8, c. 10, which gives the cestui que use of a rent all such remedies as he would have had if the rent had been actually and really granted to him; but that has place only where one is seised of lands in trust that another shall have a rent out of them, not where a rent is granted to one to the use of another." 1 Mod. 223. The report in 2 Mod. 138 is inconsistent with this last dictum, which, however, is correct. The case is only a decision that the particular covenant in question was merely collateral, and, though open to observation, may, perhaps, be distinguished on the ground that the covenant was not only entered into with the grantees, but was also worded for payment to them personally. It must be admitted that the case is quite consistent with the dictum of Lord Ellenborough in *Milnes* v. *Branch*, ante, p. 360.]

[It is clear, however, as a general rule, that cestui que use is entitled

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Provisions of the Statute of Uses as to rents.

* [Rent-charges are subject, with other hereditaments, to the general provisions of the Statute of Uses, so that, if an existing rent-charge is granted to A., to the use of B., or if the owner of freehold land grants a rent-charge at common law to A., to the use of B., in either case the use is executed in B. But there is, also, a particular provision in the Statute of Uses, (sects. 4, 5), for the execution of rents not in existence, or not created by a grant at common law, but having their inception only in use, to the effect, that where persons are seised of lands to the use that some other person shall have a rent out of the same lands for a life or years, or other special time, the cestui que use shall be seised of the rent, and have the same remedies, as if it had been granted to him. Vide ante, Vol. 2, pp. 8, 25. The position there stated from Sugd. Gilbert, p. 194, that a rent cannot be merely created by bargain and sale, cannot be supported on principle. The limitation in the case in the text did not come within this special clause.]

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to all benefits and advantages inherent to the estate, (except, it seems, the title-deeds, ante, p. 88), and, among them, to covenants running with the land. See 1 Sand. Us. 120, 5th ed.; Sugd. Gilb. Us. 184; *Lee* v. *Arnold*, 4 Leon. 27; *S. C.* nom. *Appowel* v. *Monnoux*, Moo. 97, (a case of a reversion); *Roll* v. *Osborne*, Moo. 859; *Smith* v. *Tyndal*, 2 Salk. 685.]

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It follows, that the correct mode of framing covenants for title is, to make them with the releasee or grantee to uses, and then they enure, incidentally, with the land, to the cestui que use. The habendum, therefore, or the premises, if there be no habendum, (which, let it be remembered, is not an *essential* part of a conveyance), will always shew with whom such covenants ought to be entered into, and the proper words of limitation to be used; though the introduction of inaccurate words of limitation, as executors or administrators, instead of heirs, &c., would not prevent the covenants from taking due effect. *Lougher* v. *Williams*, 2 Lev. 92; *Sacheverell* v. *Froggatt*, 2 Saund. 367, 2 Lev. 13; *Anon.* Dy. 45.

With whom covenants for title should be made.

If the covenants, from having been made with the releasee to uses, have become annexed to the land, they will continue so annexed through all the subsequent modifications of ownership which the land may undergo; and in this point of view it would seem to be quite immaterial whether the cestui que use (assuming him to be the donee of a power of appointment under the ordinary limitations for preventing dower in favour of a purchaser) alien the land by exercising his power or by granting his estate; for the mere shifting of the use (which is simply the result produced by an appointment) cannot have the effect of severing from the land the covenants which have been once annexed to, or have actually begun to run with, it in the hands of the first or the immediate cestui que use. This seems to be the inevitable consequence of admitting the covenants to have passed with the land to the cestui que use at all, and is not contradicted by the case of *Roach* v. *Wadham*, 6 East, 289; ante, p. 346; for there the covenant, which was held not to bind the covenantor's appointee, was entered into by the cestui que use, and not by the releasee to uses. (See some sensible observations on this subject, Cornish on Purch. Deeds, p. 50, n.)

Covenants once annexed, continue to run with the land.

If this view of the case be correct, it seems to shew, in extenuation of the evils said to belong to an appointment as a mode of conveyance, in regard to its effect upon covenants for title, &c., (vide ante, p. 69), that* the adoption of this species of assurance does not deprive the ap-

As to covenants in deeds of appointment.

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* [The better opinion, it has been seen, is, that covenants with the owner of the land by a stranger (in which situation an appointor stands) are not covenants in gross, and, consequently, that the vendor's covenants, in a conveyance by appointment in fee, run with the land in the same manner as in a conveyance at common law. But in a conveyance by appointment, as in a conveyance by release, the covenants will only run with the estate of the covenantee, and, if he takes but a particular estate, and an estate in remainder is limited to another person, the covenants will not run with the latter estate, unless the remainderman is expressly named in the covenant, and also as a party to the deed. In the case of an appointment to the common uses for preventing dower, the appointor's covenants with the purchaser, his heirs and assigns, (or even if the word "assigns" is omitted), will run with

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pointee of the benefit of the covenants contained in the antecedent conveyance†; the true doctrine being, it is conceived, that covenants entered into with the releasee to uses run with the land for the benefit of all the cestuis que use, whose estates are derived out of the momentary seisin of such releasee, whether such cestuis que use be or be not parties to the conveyance, and whether they claim immediately under it or by virtue of an appointment made under a power contained in such conveyance. If, however, the covenants in question were made, not with the releasee to uses, but with the cestui que use, although it should seem they would run with the land for the benefit of the representatives and assigns of the covenantee, i. e. any person who claims as the successor or alienee of *his* estate; yet, in such case, an appointee of such cestui que use (who does not stand in this position, but is *in* under the deed creating the power), cannot, it is apprehended, sue upon the covenants contained in such deed, since the appointee claims, not as the alienee of the covenantee, but as a substituted cestui que use. Hence, it is obvious that the appointee could no more claim the benefit of the covenants entered into with the donee of the power, than could cestui que use A. claim the benefit of covenants entered into with cestui que use B., whose estate was limited by the same conveyance.

Effect where covenants are entered into with cestui que use.

Enough has been said, to shew the propriety of the recommendation with which we set out, that, where the releasee to uses and the purchaser are different persons, covenants which are intended to run with the land should be made with the former. By parity of reasoning, where the same person is both releasee to uses and cestui que use, the covenants should be made with him and his heirs and assigns, or, rather, with him and his heirs alone, (in conformity to the habendum), and not with the covenantee, his appointees, heirs, and assigns, since the latter mode of framing the covenants would seem to imply that the purchaser is made

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the life estate, and with the remainder in fee limited to him; but they will not run with the land for the benefit of the purchaser's appointees. In an indenture, therefore, it seems to be useless to name the appointees as covenantees, though their names may properly occur in the subsequent part of the covenant. Where the covenants are contained in a deed-poll, the case is different, because all the world are parties to a deed-poll. But it may be asked, whether a person not in esse at the time of the execution of a deed-poll, can take a direct benefit or right of action under it. If it were clear that the obligation of a covenant would not run with the land of the covenantor, at least where it did not concern some easement, there would be no objection in any case, on the ground of perpetuity, to allowing covenants by deed-poll to be made with persons not in esse; and of course such an objection could never be raised to the ordinary covenants for title. It would not be necessary to resort to a deed-poll for this purpose; the conveyance might be made by indenture between "A. B., of &c., of the first part; C. D., of &c., of the second part; and every person taking any estate under the limitations hereinafter contained, (*or*, every person to whom the benefit of the covenants hereinafter contained is hereinafter limited or expressed to extend), of the third part."]

† [See Third Real Prop. Rep. 52. Sir E. Sugden appears to have misunderstood this and some other passages in that document. See 2 Sugd. Vend. 461.]

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the covenantee in the character of cestui que use, and not, as the fact is, in that of releasee. Where the covenants in a conveyance are clearly covenants in gross, (as *all* covenants are usually considered to be which proceed from a person who has no estate in the lands), they will of course be made with the purchaser, on account of the convenience of bringing actions in his name, rather than in that of another person*. The point is not farther material. In the preceding observations, it has been assumed, that a covenant by a stranger with the owner of the land is necessarily a covenant in gross; and this is the commonly received opinion; but, perhaps, the point is not quite so clear, either upon principle or authority, as is generally imagined. [Vide ante, p. 356.]

As to the importance of covenants for title.

Mr. Preston's opinion.

[The unsatisfactory state of the authorities, and the remarkable obscurity in which the principles under discussion are involved, have caused the preceding disquisition to be extended to a length which the importance of the subject will, perhaps, scarcely justify; for it is certain that the value of covenants for title is much overrated. Mr. Preston observes, that "purchasers in general attach more value to covenants for title than they are worth. Considering the property of parties, the chance of eventual insolvency, &c., covenants rarely produce the benefit which is expected from them, and where the property is subdivided by sales, it seems to follow from a maxim of law that the purchasers lose the benefit of the former covenants, on the ground that the remedy cannot be apportioned, or, in more correct terms, the covenantor cannot be subjected to several actions. Thus, where a man sells two farms to A., and covenants with him, his heirs and assigns, and one of these farms is sold by A. to B., B. can never sue on this covenant, since it would subject the covenantor to several actions; and it is apprehended that an objection against a title could not be sustained merely on the absence of the usual and regular covenants for title in former conveyances. Even under the statute of 32 Hen. 8, c. 34, a distinction is made, for the assignee of *part of the estate* of the reversioner may, but an assignee of *part of the land* may not, maintain an action." (3 Prest. Abstr. 57).]

[Sir E. Sugden, however, controverts the above opinion of Mr. Preston, and says, that the better opinion seems to be, that an alienee of one of the estates could maintain covenant against the covenantor where the covenants run with the land, and as such an action would lie either

* [If, however, the purchaser is not the releasee to uses, it will be proper to make the covenants with the latter also; for, as has been seen, there is much to be said in favour of the right of the assignee to sue on such covenants.] If that general doctrine were established, it would render inapplicable some of the distinctions and suggestions considered in the text; but to what extent such effect would be produced, it might, perhaps, in some cases be rather difficult to determine. While, however, the principal question remains unsettled, it would be premature to discuss subordinate points; and it should be borne in mind, that, whatever opinion is entertained upon the subject, prudence requires that we do not forego any precaution which the contrary hypothesis would render necessary. Covenants, therefore, which are intended to run with the land, should, when it is practicable, be so framed as that they may, upon principles acknowledged by all, clearly have this effect.

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for damages, which would be measured by the loss of the assignee as far as he might be entitled to recover it under the covenant, or for an act to be done, *e. g.* further assurance, which might properly be confined to the particular proportion of the property, [unless the assurances were to be executed at the expense of the covenantor. See *Washington* v. *Burgon*, Moore, 570.] It does not seem that any injustice would arise by suffering several covenants to lie, although it might expose the covenantor to inconvenience, whereas the denial of the right to each assignee might lead to positive injustice, or, if not, to greater inconvenience on their part. 2 Sugd. Vend. 508.]

Assignee of part of the land in reversion may sue. *Twynam* v. *Pickard.*

[There seems to be no doubt that Mr. Preston's position cannot be sustained; and the distinction he takes between grantees of part of the estate and grantees of part of the land in reversion is contrary to law. In *Twynam* v. *Pickard*, 2 B. & Al. 105, an assignee of part of the lands in reversion was held entitled to sue; and a covenant, which may be apportioned, was distinguished from a condition, which is indivisible. "It has been decided," said Abbott, J., "that the assignee of part of the premises for the term may maintain this action (*Palmer* v. *Edwards*, Doug. 187), and it, therefore, appears to me to follow that the assignee of the reversion of part may do the same." In *Simpson* v. *Clayton*, 6 Scott, 469, (an action by an assignee of part of the lands demised), it was contended that a covenant to renew, or to obtain a renewal, was not in its nature divisible; but the action was held to be well brought.]

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[As the covenants for title are of more value in proportion as the conveyance itself is less operative, it becomes important to ascertain how the doctrine of estoppel will operate in those cases in which the conveyance passes no estate, or no such estate as the purchaser's assignee may be enabled to rely on, when the necessity of resorting to the covenants is first discovered. Where the supposed conveyance did not pass the legal estate, there can be no assignee at law. It has been laid down, that the benefit of a covenant will not run with an estate, to which the covenantee is only entitled by estoppel. Assuming for the present that this is so, it may be asked, whether, if (under the doctrine in *Doe* v. *Oliver*, 5 Man. & Ry. 202, ante, Vol. 4, p. 122, that the estate, when it reaches the party estopped, feeds the estoppel) the covenantee eventually obtains an estate, the covenants will then attach. Of course the obligation of a real covenant will run with an estoppel, that is to say, will bind all persons claiming the estate through or under the party estopped.]

[The doctrine of estoppel, if carried strictly out, would seem to require that the grantee should not, in an action on the indenture, be permitted to allege that it did not operate according to its purport. But, if this were so, an action could scarcely be brought in any case upon the covenants for title in a conveyance; for if the deed purported to confer a good title, and therefore did not disclose any defect, the grantee would be estopped from alleging a defect, and, though evicted, must necessarily admit that the eviction was unlawful, and therefore not within the covenants; and the case of *Noke* v. *Awder*, cited infra, seems to have been founded too much on this notion. The proper way of regarding the matter appears to be, that statements by deed are estoppels only quoad the purpose for which they are made, and so may estop for one purpose, and not for another; (ante, p. 81, *Gaunt* v. *Wainman*, 3 Scott, 413);

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therefore the recital of the grantor's title shall estop him and his assigns from denying that he then could convey, because it is made with a view to conveyance, and for the same reason it shall estop the grantee, so long as he is not ousted, from asserting a want of title in his grantor as an excuse for not performing his part of the compact. But quoad the covenants for title, the recital of title is obviously immaterial, or rather may be said to be contingently inconsistent with them, and, so far only as may be necessary for their operating, to be set loose by them.]

Edwards v. *Brown.*

Recitals in deed-poll held not to bind all the parties.

[Thus, in *Edwards* v. *Brown*, 3 You. & J. 423, B., proposing to borrow money of the plaintiff, executed a bond to him, in which H. and S. joined as sureties; reciting, that B. was seised in tail of the estate of which he had covenanted to suffer a recovery to the use of the plaintiff in fee, and conditioned to be void if the recovery should be suffered so and in such manner as that, under and by virtue thereof, the estate should be vested in the plaintiff, his heirs and assigns, for ever. The recovery was suffered, but B. being merely tenant for life, it was held, that the plaintiff, in an action against all the obligees, was not estopped from shewing that fact. Garrow, B.—"It is said, that the recitals in the condition are to bind the parties as matters of fact; and it is reasonable that it should be so with respect to those who are conusant of those facts. The assertors of the facts are the mortgagor and his sureties; but the mortgagee knows nothing of those facts, and acts upon the assumption of that which they represent. Again, it is said that this is the case of a surety. Why does a man require more obligors than one, except that he may have a further security? The surety may decline to enter into the obligation; but, if he does enter into it, he must be presumed to have done so with a knowledge of the facts." So, per Williams, J., 2 Bulst. 12, "If a man will grant to another his manor of Dale in which he has nothing, and covenant that he had good right to grant this, whereas he had no right at all, this is clearly a breach of covenant. See *Style* v. *Herring*, Cro. Jac. 73; *Foster* v. *Pierson*, 4 T. R. 617; *Browning* v. *Wright*, 2 Bos. & P. 14, n.; 2 Wms. Saund. 181, n., and the cases there cited, by which it is settled, that, in an action on covenants for title, it is sufficient to aver that the person by whom the plaintiff was evicted had lawful title, not derived from the plaintiff, or that he had lawful title before the date of the grant to the plaintiff, without setting out that title.]

Noke v. *Awder.*

Covenant held not to run with title by estoppel.

[Upon the specific question, whether the benefit of covenants will run with an estate by estoppel, there is very little authority. In *Noke* v. *Awder*, Cro. El. 373, 436; Moo. 419, J. King, in 10 Eliz., made a lease for years to Awder, the defendant, who, in 15 Eliz., by indenture, granted it to Abel, and covenanted with him that he and his assigns should peaceably enjoy it. Abel grants it to J. S., who grants it to the plaintiff, who, being ejected by a stranger, brings this action of covenant against Awder; after verdict for the plaintiff, on a collateral issue, Coke, on arrest of judgment, on the part of the defendant, objected that the plaintiff by his declaration alleged, that, before J. King (the lessor) had any thing, one R. King was seised in fee, viz. in 7 Eliz., and in 15 Eliz. died so seised, and it descended upon T. King, who entered upon the plaintiff and ousted him; so that, either at the time of the lease J. King had nothing, and the lease passed nothing but by

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estoppel, or, admitting that J. King had a lease for years sufficient to enable him to demise, the entry of T. King was unlawful, and so no breach, so that quâcumque viâ datâ the declaration was ill. And all the Court held it clear that the action lay not, for the plaintiff ought to have shewn an estate by descent in J. King at the time of the lease and assignment made, or an estate whereby he might make a lease, and that this was afterwards determined, and so confess and avoid the estate in the lessor, otherwise this action of covenant lieth not, and it never lies upon the assignment of an estate by estoppel. But they postponed judgment, and, adhering to their opinion as to the estoppel, finally decided for the defendant, on the ground that they would not intend a lease by estoppel, and so the entry was unlawful, and no breach. Moore says, that the point as to estoppel was so adjudged in 35 Eliz. *Armiter* v. *Parkes*. See 3 B. & Al. 396.]

Whitton v. *Peacock.*

[In *Whitton* v. *Peacock*, 2 Scott, 630 ; 3 Myl. & K. 325, a copyholder, in 1755, devised the copyhold to her nephew, but without having surrendered to the use of her will; the devisee was admitted, and surrendered to the use of B. M., who was admitted, and surrendered to the use of his will, and obtained a license to demise, but died without having exercised it. His devisee, M. L., was admitted, and executed separate leases of two distinct portions of the estate to K., at rents of *5l.*, who entered into certain covenants. These leases did not disclose the want of title in the lessor. Afterwards M. L. acquired the legal estate, and by indenture between M. L. and K., reciting the leases, and that it was agreed that K. should have the whole of the property belonging to J. S. at the rent of *10l.* only; but that, instead of cancelling the leases already granted of part, they should remain, and another lease be granted of the residue of the property at the rent of *10l.*, in substitution for the two rents of *5l.* each ; M. L. demised to K. the whole of the premises, except such parts as were included in the former leases, and K. covenanted to pay the rent and repair the premises. It was held by the Court of Common Pleas, on a case sent by the Master of the Rolls, that a surrenderee claiming under M. L. could not sue on the covenants contained in the original leases. The following passages were cited from Wms. Saund. on behalf of the plaintiff and defendant respectively:—Where the grantor or lessor *has nothing* in the lands at the time of the grant or lease, and therefore no interest passes out of him, but the title begins by the estoppel which the deed creates between the parties, such estoppel runs with the land, into whose hand soever it comes, whether heir or assignee." 2 Wms. Saund. 418, n. "Where the plaintiff declares in covenant upon a demise by himself, he is not obliged to set out any title to the lands, &c., demised, but may begin his declaration with stating, that 'whereas by a certain indenture he demised' &c. But, in an action by an assignee of the reversion, he must set out the title of the lessor to the demised premises, that it may appear he had such an estate in the reversion as might be legally assigned to the plaintiff. Clift's Ent. 213, pt. 7; Lil. Ent. 132, 135." 1 Wms. Saund. 233, a, n. No reasons were given by the Court. But in *Gouldsworth* v. *Knights*, 11 Mee. & W. 337, the Court of Exchequer undertook to explain the case of *Whitton* v. *Peacock*. In trespass for an unlawful distress, it appeared that lands were vested in trustees in

Gouldsworth v. *Knights.*

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trust to apply the rents to the repair of a parish church. In 1818, they demised to S. for ten years, and again in 1828 for ten years more, which expired in 1838. During the lease, S. assigned to the plaintiff, who, after the expiration of it, continued in possession under the trustees, paying rent to them. In 1819, the stat. 59 Geo. 3, c. 12, was passed, constituting the churchwardens and overseers of every parish a species of corporation and trustees of all lands, &c., held for certain parochial purposes. In 1842, the trustees assigned by deed to new trustees, two of whom were churchwardens of the parish at the time the distress was made, and who authorized the distress. It was objected to the distress, that the act converted the churchwardens and overseers into a corporation, and vested the lands in them, so that the distress, not being authorized at a meeting, was illegal. But the Court held, that, quâcunque viâ, the authority was sufficient. Parke, B., added, "Another answer was given by the Court to my Brother Byles's application, which I notice that we may not be supposed to have acquiesced in his argument. It was this,—the plaintiff had paid rent to the old trustees more than once, and this was no doubt evidence of a *new taking* under them as tenant from year to year, and such new taking precluded the plaintiff from contesting the title of the old trustees, and consequently that of the new trustees, who claimed under them by an assignment by deed*, and had a good title by estoppel, supposing that the estate had already passed to the corporation of churchwardens and overseers. But my Brother Byles contended, that, as the old trustees had no title at all, nothing would pass by their grant to the new trustees, and he referred to two recent cases as establishing this proposition, which the Court have since had an opportunity of examining. Neither of these cases is applicable. The first was that of *Whitton* v. *Peacock*, (2 Bing. N. C. 411), in which the substance of the marginal note is, that, if a person who has an equitable estate only demises by deed, and then conveys the reversion, the assignee cannot maintain an action on the covenants in the lease. That is very inaccurate. The point decided was this:—A copyholder devised his estate to another without surrendering to the use of his will. The devisee of the devisee, who, of course, had no estate at all, either legal or equitable, demised part of the copyhold by deed, and the lessee, covenanted to pay rent, and assigned the lease. The heir-at-law of the devisor afterwards surrendered to the use of the second devisee, who afterwards demised another part of the copyhold to the same lessee, and instead of granting a fresh lease to the lessee of the part before demised, took a covenant from him to perform the covenants contained in that lease. The lessor afterwards surrendered the copyhold to another, and the question was, whether the surrenderee could maintain an action on these covenants against the assignee of the lease. The Court held most properly, that no such action would lie. No reasons are given, but there is clearly a satisfactory

* [This seems to be quite immaterial; the question was not, whether as between the old and new trustees, the former were estopped, but whether the tenant was estopped, which, of course, he could not be by the deed of the old trustees made *after* his acknowledgment of their title.]

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one, for the reversion by estoppel in the first lease was not a copyhold transferable by surrender and admittance. The other case referred to was *Doe* d. *Higginbotham* v. *Barton*, 3 Per. & D. 194. In that case, one who had only an equity of redemption granted a mortgage to the lessor of the plaintiffs, who brought an ejectment, and the defendants, the tenants, were permitted to shew that there was a prior mortgage, and that the first mortgagee had given notice to them to pay him*. That was equivalent to shewing eviction by title paramount."]

Remarks on *Whitton* v. *Peacock*.

[The above explanation of *Whitton* v. *Peacock* does not make the difference between that case and *Gouldsworth* v. *Knights* very clear. When a stranger to the legal estate puts a party in possession as his tenant, the latter, by accepting possession, is estopped from denying that the party from whom he took it was entitled to confer it; and, by the tenant's conduct, this estoppel may be continued indefinitely. So, except in case of mistake or fraud, (see *Jew* v. *Wood*, Cr. & Ph. 194), he is estopped from denying the title of a party whom he has accepted as assignee of the reversion. But this estoppel is not prospective; in no case where there is not a deed is the tenant estopped from shewing that, subsequently to his last acknowledgment of A.'s title, that has been superseded by the title of B., whether paramount or derivative is immaterial. (See, however, *Agar* v. *Young*, 1 Car. & M. 78). A lease or grant by indenture operates differently. There each party to the deed, and all persons subsequently claiming in interest under him, are estopped in any action or proceeding founded in the deed from denying any material statement in it. (Ante, p. 82; 2 Stark. 52; 3 Scott, 413). Nor, except by way of counter estoppel, can an estoppel in one deed be removed or explained by another. This is carried so far, that, as we have seen in another place, (ante, Vol. 7, p. 539), if a licensee of a patent executes the deed of license, and it contains a recital that the grantor is the inventor, he cannot, in defence to an action on that deed, assert that the patent was void because the patentee was not the inventor. But it is laid down, that where any interest passes by the deed, neither party is estopped from shewing the inability of the grantor to grant all that he pretended. 2 Wms. Saund. 418, n. The ground of this distinction, if it is to be understood in all the generality of the forms in which it is announced, has never been explained†.

Estoppel by matter in pais.

Estoppel by deed.

No estoppel where any interest passes.

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* [In *Doe* v. *Barton* the tenancy was not under any deed.]

† [The early authorities do not support the general doctrine for which they are cited. Thus, in *Gilman* or *Holman* v. *Hoare*, 1 Salk. 275; 3 Id. 152, it was held to be no defence to an action of debt for rent on a demise by indenture for forty years, that, a year before, the plaintiff had made a demise to another for forty years. The position in 1 Inst. 47, b, that, if tenant pur autre vie lease for years by indenture, and afterwards purchase the reversion, the lease ends with the life of cestui que vie, was cited; but Holt said, the reason of that is, because tenant for life has a freehold, which is a greater estate, and the lease will need no estoppel if the life endure; but here the lease must necessarily be void for thirty-nine years, unless made good by estoppel; and that a lease for years may operate in part by estoppel, and in part by passing a real interest, is plain from concurrent leases. See *Blake*

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Apart from authority, it should seem to be as inconsistent with a deed, purporting to be a conveyance of the fee by A., to say that A. has only a life estate, as to say that A. had no estate. In the case of a lease, there is usually an express or implied absolute warranty of, or covenant for, quiet enjoyment, and therefore, in such cases, it has been held (though the reasoning will not bear examination), that a plea of eviction by title paramount is not inconsistent with the estoppel. See *Holman* or *Gilman* v. *Hoare*, Carth. 248; 3 Salk. 152; *Johnson* v. *Jones*, 9 Ad. & El. 809; *Boodle* v. *Campbell*, 8 Jur. 475. Whatever may be the principle, it is clear that the covenantee himself, suing on any of the covenants for title, is not estopped from shewing, if not a mere defect of title, yet a lawful eviction of himself by one claiming a title inconsistent with the purport of the indenture. See *Severn* v. *Clarke*, 1 Leon. 122. But to return to the judgment in *Gouldsworth* v. *Knights*. The point which the Court was ready to decide in that case, had it been necessary, was, that a tenant who is estopped from disputing his lessor's title is estopped from disputing the title of his lessor's assignee; and for this there is some direct authority. (*Doe* d. *Biddle* v. *Abrahams*, 1 Stark. 305. See *Rennie* v. *Robinson*, 1 Bing. 147; 7 Moore, 539; *Doe* d. *Oliver* v. *Powell*, 1 Ad. & E. 531, et vide infra). This appears to have been the precise point in *Whitton* v. *Peacock*. The question there was, not whether in fact the lessor had such a reversion as would pass by surrender, but whether the lessee, and those claiming under him, were not estopped from denying that he had such an interest. The only conclusion consistent with the certificate of the Court appears to be that (contrary to the opinion expressed by the learned Judge in equity who sent the case) they were not.]

Estoppel.

Covenantee not estopped by recital of title.

Whether assignee may take advantage of estoppel.

[In *Palmer* v. *Ekins*, 2 Str. 817; 2 Lord Raym. 1550, a lessee, in an action by the assignee of the reversion, was not allowed to deny that his lessor had title at the time of the lease, and the Court said, that, though the plaintiff was an assignee, he might take advantage of the estoppel, for it runs with the land. The authorities, however, cited for that position only prove that the estoppel *binds* the land in the hands of the parties claiming under the party estopped. To say that the *benefit* of an estoppel, which is nothing more than a conclusive admission, can run with the land seems to be absurd. What land? It was resolved in that case, that if the plea did not amount to nil habuit, &c., yet it was ill on account of the generality of the traverse, which ties up the plaintiff to prove the estate alleged in the declaration, when any other estate would do, even by disseisin, if the lessee enjoyed. In *Carvick* v. *Blagrave*, 4 J. B. Moore, 303, in covenant for rent, the declaration alleged that the lessor was possessed for the residue of a term of twenty-two years, commencing from the 25th Dec. 1717, and that, on the 7th March, 1811, he by indenture demised to the defendant, and afterwards assigned the reversion to the plaintiff. The defendant pleaded in bar, that the lessor

Palmer v. *Ekins.*

Carvick v. *Blagrave.*

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v. *Foster*, 8 T. R. 487; *Neave* v. *Moss*, 8 Moore, 389; *Anon.*, Vent. 358; *Doe* v. *Seaton*, 2 Cr. M. & R. 728. In *Adams* v. *Gibney*, 4 Moo. & P. 511, it was decided, that the implied warranty in an absolute lease for years by tenant for life does not extend beyond the lessor's life. Sed quære. See Cr. El. 157, 7 Scott, 69, 2 Chitt. 646, 1 Nev. & P. 633.]

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was not, at the time of making the said under-lease, possessed of the said premises for the residue of the said supposed term, modo et formâ, &c. The Court held, that the allegation in the declaration was material, and the plea put in issue the substance of it, namely, whether the lessor had such a term as he could carve the derivative term out of. "The lessee is under no engagement, nor liable to any one but the legal assignee. The allegation of the possession by the lessor for a term of twenty-two years is made by the assignee and not by the lessor himself, and the lessee has a right to know whether there is a privity between him and the assignee, by means of a conveyance by the lessor of the true title."]

Estoppel binds assignee.

[The assignee of the lessee, being in possession, and not relying on a better title aliunde, is of course bound by the same estoppel as the lessee himself. *Doe* d. *Bullen* v. *Mills*, 1 Nev. & M. 25; 2 Ad. & E. 17: *Doe* d. *Manton* v. *Austin*, 2 Moo. & Sc. 107: *Taylor* v. *Needham*, 2 Taunt. 278.]

[That the purchaser has a title by estoppel is no defence to a bill for specific performance of a covenant for further assurance. *Bensley* v. *Burdon*, 8 Law J., Ch., 85.]

COVENANTS FOR TITLE.

II. On the ordinary Vendor's Covenants*.

[The question with what parties the covenants for title, &c., are to be entered into, and what representatives are to be named as covenantees, has been already considered, ante, p. 364.]

Usual covenants.

Presumption is that they are to be restricted.

[As to what are usual covenants in *leases*, see *Church* v. *Brown*, 15 Ves. 258, and the other cases cited, ante, Vol. 4, p. 297. In that case, Lord Eldon said, "If a man covenants to sell a fee-simple estate free from all incumbrances, and says no more, it is clear that covenant carries in gremio the right to proper covenants. Why? Because that sort of engagement has in all times been carried into execution in a form and mode which alter most materially, substantially, and importantly the effect of the mere conveyance. If no more is done than the agreement imports, the conveyance contains express covenants, the [operative] words operating warranties and obligations which it was not understood between the parties contracting that the one was to undertake and the other to have the benefit of; and accordingly it is perfectly settled by the law, what are the covenants as applied to the case of a vendor, who was himself a purchaser for valuable consideration, or who took by descent; and though the agreement, if literally executed, would carry all the extensive obligations to which the legal warranties flowing from the words would bind the vendor and his heirs, yet it cannot be carried into execution without express covenants, substituted for and limiting the implied covenants." See an opinion of the learned Fearne, ante, Vol. 3, p. 655. In *Browning* v. *Wright*, 2 Bos. & P. 22, the same learned Judge said, "If a man purchase an estate of inheritance, and afterwards sell it, it is to be understood primâ facie that he sells the estate as he received it; and the purchaser takes the premises granted by him with covenants against his acts. If the vendor has taken by descent, he covenants against his acts and those of his ancestors; and if by devise, it is not unusual for him to covenant against the acts of the devisor, as well as his own. With respect to leaseholds this is not always so, and

* [As to the effect of inrolled conveyances under the Yorkshire Registry Acts, vide infra, tit. Registration.]

there is an obvious reason why this should not be so. Some of the cases rest on the distinction between freehold and leasehold property. All the muniments of a freehold estate, and everything which can illustrate the title, is in the possession of the vendor. But this is seldom the case with respect to leaseholds. It sometimes happens, therefore, that parties require covenants in assignments of this kind of property, which are not required in conveyances of freeholds, such as an absolute covenant that the vendor holds a valid and indefeasible lease." It is now, however, very unusual to enter into absolute covenants in respect of leaseholds, although the purchaser is almost invariably precluded by stipulation from investigating the lessor's title*.]

COVENANTS FOR TITLE.

Distinction between freehold and leasehold titles as to covenants.

Where the vendor himself acquired the property as vendee, the covenants should be confined to his own acts. Where the property was not purchased by the vendor, but by a deceased owner, from whom the same devolved to the vendor by devise or descent, his covenants should extend to the acts of such deceased owner. See *Pickett* v. *Loggon*, 14 Ves. 239. If the property were derived by the vendor from the last purchaser for valuable consideration, through several descents or wills, the covenants should extend to the acts of all the intermediate owners, though, it seems, the rule of the Court of Chancery is to confine the covenants to the owner who immediately preceded the vendor. *Lloyd* v. *Griffith*, 3 Atk. 267 ; *Wakeman* v. *Duchess of Rutland*, 3 Ves. 236. And Sir E. B. Sugden observes, 2 Vend. 452, that a person claiming under a voluntary conveyance is considered in the same light as a devisee ; but not, it is conceived, if the voluntary conveyance contained covenants for title. The reason why a vendee is entitled to covenants extending to the acts of all the vendor's ancestors and testators from the last purchaser for valuable consideration, must be, that none of these owners could have entered into covenants for title, and not that the estate passed from them without a valuable consideration. However, it seldom happens that settlements purely voluntary contain such covenants.

As to the extent of a vendor's covenants for the title.

[In *Lloyd* v. *Griffith*, 3 Atk. 264, Mr. Lloyd had conveyed an estate

Lloyd v. *Griffith.*

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* [A solicitor is answerable to his client, if he allow him to enter into unusual covenants without explaining to him, not only their legal effect, but also that they are unusual and cannot be insisted on. *Stannard* v. *Ullithorne*, 4 Moo. & Sc. 359 ; where solicitors were held liable in an action for negligence in allowing their client, a vendor of property held for years determinable as to one moiety on the death of A., and, as to the other, on the death of B., to covenant absolutely that the terms were still subsisting, that the vendor had right to assign, and that the purchaser might enter and enjoy the premises during the two several terms, if A. and B. respectively should so long live, "without any lawful interruption, &c., of the plaintiff, his executors or administrators, or of any other person or persons whomsoever," the solicitors as well as the plaintiff being aware that B. was then dead, and that the assignee was ignorant of that circumstance ; upon which covenants the purchaser having been evicted by the reversioner, recovered against the vendor. Evidence of conveyancers was admitted to prove that the covenants were unusual. See *Stannard* v. *Forbes*, infra, p. 389, a case arising out of the same transaction.]

Solicitor answerable for permitting his client to enter into unusual covenants without explanations.

Stannard v. *Ullithorne.*

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Against whose acts vendor should covenant.

in Shropshire, subject to a mortgage for 25,000*l.*, to Mrs. Webb in fee, in consideration of 1400*l.* By his will, he devised other estates, which had descended in his family through several generations, to trustees in trust, by sale or mortgage, to pay off the charge on the Shropshire estate, and subject thereto, in trust for A. B. The devised estates were sold under an administration suit; and, for the purchaser, it was contended that Mrs. Webb should covenant for the title to the extent of her interest, and against the acts of herself, of Lloyd, her devisor, and of all his ancestors; Lord Hardwicke, C., said, "It has been said to be a rule among conveyancers, where an estate has been long in a family, that the vendor's covenant must go as far back as the first purchaser of the estate; but where the vendor claims immediately under the person who bought the estate, then he need not covenant any further back than from that person, because whoever buys this estate has the benefit of the covenants in the conveyance to the vendor's purchaser. I never heard, nor do I know of any such rule, where conveyances are to be made by a decree of this Court; the settling them, to be sure, is to be by the like kind of rule as men of judgment among the conveyancers would direct. That Mrs. Webb should covenant against all the ancestors of her devisor, &c., would be carrying it too far, for it would be unreasonable to extend it to the first purchaser, where a family have been for several generations in possession of the estate, for they may have the benefit of the Statute of Limitations and other bars in their favour; and, therefore, carrying it no farther back than to the person under whom Mrs. Webb claims is sufficient, and the counsel for the purchaser now say they are contented with it. There are, undoubtedly, a great many cases in this Court where persons covenant no further than their own acts; as, where an estate is directed to be sold for payment of debts, and no surplus remains, the Court will not require the heir to covenant any further than his own acts. The same rule as to a devisee. But suppose a sale was decreed, and after sale a considerable surplus comes to the heir or devisee, I believe there are several instances where they have been directed to covenant, in the case of the heir, that neither he nor the immediate ancestor under whom he claims, and, in the case of the devisee, that neither he nor his devisor have done any act to encumber. A good deal depends upon the quantum." The covenants were directed to be confined to the acts of Mrs. Webb and her devisor, and as to so much as she would be benefited by the estate.]

Wakeman v. *Duchess of Rutland.*

[However, in *Wakeman* v. *The Duchess of Rutland*, 3 Ves. 233, 503, Lord Loughborough, C., held, that where the devisees in trust were empowered to give discharges, the purchaser could not require the parties interested in the purchase-money even to join in the deed* as convey-

* ["It is not merely adding a party, but it is adding a party with whom any connexion would be inconvenient. The prudence of the common clause, that the receipt of the trustees shall be a discharge to the purchaser, would be defeated, and he would take upon himself the knowledge of all the trusts of the will." This is a singular oversight, unless his lordship meant to say that, by joining the cestuis que trust, the purchaser waives the benefit of that clause. He has, necessarily, notice of the trusts, whether the objects of them join or not. See 2 Sugd. Vend. 454.]

ing parties. If it were true, said his lordship, that all claiming beneficially ought pro ratâ to covenant for the title, it would be impossible to distinguish the case of a simple contract creditor for 20*l.* and a cestui que trust for 20,000*l.*; and, consequently, the estate could never be sold till the account was taken of all the debts. The decision was affirmed in D. P.; 8 Br. P. C. 145. This case is an authority and is followed in practice only where the trustees have power to give discharges. The doctrine of the Lord Chancellor appears to go beyond the necessity of the case. There is an obvious distinction between creditors, who claim adversely, and cestuis que trust who are mere volunteers; and in the case of volunteers, there is a difference where all are in esse and competent to give discharges, and where some are unborn or under disability. If A. is devisee in trust to sell and divide the proceeds between C. and D., who are sui juris, the case cannot be distinguished in substance from a devise to A. in trust for B.; and the addition of a power to give discharges in the former case, cannot, it seems, in the absence of some express stipulation, place the purchaser, even with notice, in a worse position than he would be in the latter. In both cases he knows that he is substantially contracting with the beneficial owners. See *Ex parte Witts*, 6 Jur. 937, (cited ante, p. 47). Of course, if debts are to be paid in the first instance out of the purchase-money, the rule in *Wakeman* v. *Rutland* would apply, whether an account of the debts has been taken or not, and, it seems, whether they are stated to be paid or not. See ante, p. 61. For an examination of the authorities, (which are conflicting), see Vol. 8.]

Covenants against acts of ancestor where there is a doubt as to who is the heir.

[In *Pickett* v. *Loggon*, 14 Ves. 239, Lord Eldon, C., in setting aside a purchase from an heir, on the ground of pressure and misrepresentation, said, "According to the usual course, upon the conveyance of an estate derived by descent, the covenants are against the acts of the ancestor from whom it descended, and the acts of the party conveying; and if there should have been an immediate heir, supposed to be dead, it is reasonable that the covenants should extend to his acts; but, if the sale takes place under such circumstances that it is not known whether there was an immediate heir, *and the consideration is reduced in proportion to the doubt upon the title in that respect*, no one would think of making the party covenant against the acts of such immediate heir, if there happened to be one, as then the conveyance would be all wrong; and whether the covenant is by a rich or a poor man cannot be taken into consideration.]

Rule where vendor claims under a settlement.

Where the vendor is tenant in tail under a marriage settlement, it should be observed, that, as he comes in as a purchaser for a valuable, though not for a pecuniary consideration, there seems to be no valid ground for extending his covenants to the acts of the settlor; and the settlement, if properly drawn, will have contained covenants for title by the settlor, of which the purchaser will have the benefit; and even if it does not, in strictness this is no more a reason for making the vendor's covenants extend to the acts of the settlor, than the want of covenants in the last purchase-deed (supposing the property to have been so derived) would be a ground for extending the covenants to the acts of such vendor. The practice, however, is not in complete unison with the strict rule of technical propriety in this respect; and a vendor

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claiming under a settlement does not often, and, perhaps, in fairness (apart from technical considerations) ought not to object to the covenants extending to the acts of the settlor.

Covenants by representatives of intended lessor.

[In *Page* v. *Broom*, 3 Beav. 36, the heir and assignees in bankruptcy of deceased equitable owners, seeking specific performance of an agreement to take a lease, were held bound to the extent of their interest, to enter into the special covenants mentioned in the agreement.]

As to referring to the acts of trustees &c. in the covenants for title.

The practice of conveyancers seems to be various, as to referring, at the commencement of the covenants for title, expressly to the acts of persons who concur in the conveyance as trustees or incumbrancers, by the direction of the vendor. Some gentlemen omit them here, but refer to such persons at the end of the covenant for quiet enjoyment, and also of the covenant against incumbrances; others, again, mention them in the latter, but not in the former covenant; while other practitioners omit them altogether, referring only in general terms throughout all the covenants to the acts of the covenantor and persons claiming under him, or any other person to whose acts the covenant extends. All seem to agree in not introducing the mention of the parties in question in the covenant for further assurance. Perhaps the true distinction is this: if the estate of the trustees or incumbrancers were created by the vendor himself, or by any person to whose acts his covenants extend, it is unnecessary to specify them, as they will be included in the general terms of the covenant; but if such estate do not fall within the scope of the covenants, then the persons in question ought to be referred to nominatim. This, however, rarely happens, and therefore the point is not very material. Correctness, it is obvious, requires that all the covenants should be co-extensive; and there seems to be no reason why the names of these concurring parties, if inserted in the other covenants, should be omitted in the covenant for further assurance; they should be named in all or none. Vide infra, p. 383.

What a breach of covenant for quiet enjoyment.

Wrongful acts.

[The covenant for quiet enjoyment, &c., whether absolute or restricted to the acts of particular persons, it is now settled, is not broken by a *wrongful* disturbance by any person other than the covenantor, his heirs or executors, (being named), or any person specially named in the covenant, for the law gives a direct remedy upon such a disturbance. *Hayes* v. *Bickerstaff*, Vaugh. 118; *Crosse* v. *Young*, 2 Show. 425; 2 Wms. Saund. 178, n., 181, n.: *Watkeys* v. *De Lancey*, 4 Doug. 354; 13 East, 79: *Perry* v. *Edwards*, Str. 400; *Dudley* v. *Folliott*, 3 T. R. 584; *Foster* v. *Mapes*, Cro. El. 212; Hob. 35: *Nash* v. *Palmer*, 5 Man. & S. 374; *Fowle* v. *Welsh*, 1 B. & Cr. 29; 2 D. & Ry. 33. And even where the covenant is only against the *lawful* acts of the covenantor, &c., it extends to any disturbance by him under a claim of title, and not as a mere trespass only. Vin. Ab. *Condition*, (U. a.); *Crosse* v. *Young*, 2 Show. 425; *Penn* v. *Glover*, Cr. El. 421; *Lloyd* v. *Tomkies*, 1 T. R. 671; *Seddon* v. *Senate*, 13 East, 63 (on covenants in an assignment of a medicine); *Perry* v. *Edwards*, Stra. 400. In the case of *Jerritt* v. *Weare*, 3 Price, 575, a conveyance of freeholds contained absolute covenants that the vendors were lawfully seised of, interested in, or entitled to the premises, without any condition, estate, incumbrance, &c., except

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certain rents and services due to the lord, and had power to convey; there were also the usual limited covenants for quiet enjoyment, &c. It appeared that at the time of the conveyance certain persons were wrongfully in possession of a small part of the premises which the lady of the manor had treated as waste, and demised to them. It was held not to be a disseisin by the lessor, the lease being an innocent assurance, and made by mistake, and the lessor having subsequently received rent from the plaintiff, in respect of her seignory; nor a disseisin by the lessee, because they entered claiming an estate for years only. Not being a disseisin, the consequence was considered to follow, that there was no breach of covenant. Wood, B., however, relied also on the doctrine, that the covenants could not extend to the wrongful acts of strangers. But this, as Sir E. Sugden observes, (2 Vend. 514), can hardly apply where there is a party actually in possession, and adversely to the vendor's title, at the date of the conveyance. A covenant against all claiming, or "pretending to claim," any right, has been held to extend to tortious entries. *Chaplain* v. *Southgate*, 10 Mod. 384. It has been held that a suit in equity is no breach of a covenant against lawful eviction. *Selby* v. *Chute*, 1 Brownl. 23; Moo. 559: *Anon.*, 3 Leon. 71. But this opinion appears to have been overruled. *Hunt* v. *Danvers*, T. Raym. 370. See *Calthorp* v. *Heyton*, 2 Mod. 54; Vin. Ab. *Condit.* (U. a. 2).]

Quiet enjoyment.

Equitable claims.

[Upon the construction of the words "by or through the means, title, procurement," &c., the leading case is *Butler* v. *Swinnerton*, Cr. Jac. 656; 2 Roll. R. 286; Palm. 332, where the declaration alleged, that J. S. procured a fine to be levied to him and his wife, and the heirs of J. S., and afterwards demised the land to the plaintiff for twenty-one years, covenanting that he should enjoy without the let or disturbance of J. S., his heirs or assigns, or of any other person, by or through his means, title, or procurement, and that the defendant, his widow and executrix, had ousted the plaintiff. It was held on demurrer, that the fine being averred to have been procured by J. S., his widow claimed by his means, though her title was derived from another, and so it was a breach. Doddridge, J., distinguished between the words "title" and "means or procurement." He said, if such a lease and covenant had been made by an original grantee in tail, ouster by the issue would have been a breach, for the descent is by grantee's means, though not by his title; but not if they had been made by issue in tail, whose issue claims neither by his means nor by his title; or by lessee for life, remainder over, and the remainderman entered. But, if he had enfeoffed upon condition to be enfeoffed for life, remainder over, the entry of the remainderman would have been a breach. So, if the lessor had been tenant in fee, and his widow had entered for dower; but not if his mother had entered for her dower. In this case, as the estate was in the feme, because her husband did not disagree, that amounted in law to an agreement by him, and so it was in her by his means.]

What is a disturbance by or through the means, &c., of the covenantor.

Butler v. *Swinnerton.*

[So, where a fine was levied of the wife's estate in fee, to the use of A., the husband for life, with remainders over, with a leasing power, and a joint power of revocation and appointment to husband and wife, which they exercised by revoking all the uses following the life estate and leasing power, and appointing a remainder to the wife for life, remainder to B.; an eviction by B. was held to be a breach of a covenant against

Hurd v. *Fletcher.*

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Quiet enjoyment, &c.

disturbance "by A., his heirs or assigns, or any person or persons claiming, or to claim by, from, or under him," contained in a lease by him, which did not pursue the power. *Hurd* v. *Fletcher*, Doug. 43; *S. P. Evans* v. *Vaughan*, 4 B. & Cr. 261; 6 D. & Ry. 349. And of course a covenant in a lease (whether for years or for lives) for enjoyment "during the said term" means, not the term which the lessor is capable of granting, but that which he professed to grant. *Wright* v. *Cartwright*, Burr. 282.]

What are "acts or means" of the covenantor.

[But "the word 'acts' means something done by the person against whose acts the covenant is made, and the word 'means' has a similar meaning—something proceeding from the person covenanting;" and, therefore, where the sub-lessee was not informed by the mesne lessor of a clause in the original lease against carrying on trade in the premises, and underlet to a tenant who incurred a forfeiture by doing so, it was held to be no breach of the original lessor's covenant against eviction, &c., by or from her, or by or through her acts, means, right, title, forfeiture, privity, or procurement. *Spencer* v. *Marriott*, 1 B. & Cr. 457; 2 D. & Ry. 665.]

"Default" in not having suffered a recovery.

Lady Cavan v. *Pulteney.*

[Where a tenant in tail in possession, conceiving that he was entitled to the fee-simple under an appointment, which turned out to be void, made leases reciting that he was seised of an estate of freehold and inheritance in the premises, and covenanted for quiet enjoyment against himself, his heirs, executors, administrators, or assigns, or any other person or persons lawfully claiming or to claim by, from, or under him, them, or any of them, or by or through his, their, or any of their acts, means, *default*, or procurement, Lord Loughborough said, it was clear that, if the lessees were evicted by title paramount, [i. e. such title as the lessor could have barred by recovery], they might have satisfaction from his assets on the covenant. But his lordship declined to relieve specifically by raising a case of election against the issue in tail, who was interested in the lessor's assets. *Lady Cavan* v. *Pulteney*, 2 Ves. jun. 544. See 2 Moo. & Sc. 616. In *Howes* v. *Brushfield*, 3 East, 491, this construction of the word "default" was carried to a great length. There the vendor covenanted, that, notwithstanding any act, &c., by him committed, or wilfully *suffered* to the contrary, he was seised free from incumbrances, and for quiet enjoyment, &c., against all persons claiming by, from, &c., the vendor or his heirs, or by, through, or with his or their acts, means, *default*, privity, or procurement, free from all incumbrances created or *suffered* by the vendor or any person so claiming; and the covenant was held on demurrer to extend to arrears of quit-rent which were not shewn to have accrued in the vendor's time. If it was in arrear in his lifetime, said Lord Ellenborough, it is a consequence of law that it was by his default, that is, by his default in respect of the party with whom he covenanted to leave the estate unincumbered. See *Stanley* v. *Hayes*, infra, p. 380, n. This decision has been strongly commented on by Sir E. Sugden. (2 Vend. 317). It certainly seems difficult to maintain that the omission to pay off a mortgage, or to discharge a redeemable annuity created by the vendor's predecessor in title, would not be a default within the principle of the case. That payment might possibly have been enforced against him personally by distress of his goods, in the case of the rent, does not afford a satisfactory groun of distinction.]

Howes v. *Brushfield.*

Arrears of quit-rent.

Quiet enjoyment, &c.,

[But accepting a title with knowledge that it is defeasible, even from parties who may be able to make it absolute, is not a "neglect or default" within the meaning of those words as used in covenants for title. As in *Woodhouse* v. *Jenkins*, 9 Bingh. 431; 2 Moo. & Sc. 599, where the defendant having taken a lease for ninety-nine years from a tenant for life, and his son, remainderman in tail, with notice of their title, (which was recited in a contemporaneous bond for performance of the lessor's covenants), made an under-lease with a covenant against eviction, &c., "by the defendant, his heirs, &c., or by any other person or persons lawfully claiming or to claim, by, from, or under him, them, or any of them, or by his, their, or any of their acts, means, consent, neglect, default, privity, or procurement." Eviction by the ultimate remainderman was held to be no breach. The defendant had no means of compelling his lessors to suffer a recovery. See *Costigan* v. *Hastler*, 2 Sch. & Lef. 160. "It may, indeed," said Tindal, C. J., in delivering the opinion of the Court, "shew a want of discretion, that he took leases under such a defeasible title, but a *neglect* and *default* seem to imply something more than the mere want of discretion with respect to his own interest, something like the breach of a duty or legal obligation existing at the time: those words, in their proper sense, implying the not doing some act to secure his title, which he ought to have done, and the not preventing or avoiding some danger to the title which he might have prevented." "No *act* is done by the covenantor, no consent is given to the eviction; there is no *privity*, no *procurement*." The decision appears to deprive the word "privity" of any effect,—of course, it is not used in these covenants in the technical sense in which it is used when privity of estate or of contract is spoken of,—either it means "knowledge," or it has no meaning to the purpose. To speak of claiming *by* the covenantor's privity is not very accurate, but bad grammar will not defeat an evident intention, and if the meaning was not "with the privity," i. e. knowledge of the covenantor, it is hard to say what was intended. If the covenant had been thrown into a different but very usual form—"that notwithstanding any act &c., made, done &c., by the covenantor, his heirs, &c., or by his or their neglect, default, privity, or procurement," this construction would be still more obvious. See *Hobson* v. *Middleton*, 6 B. & Cr. 295, stated infra. It is clear, however, that the vendor may be made answerable in equity beyond his liability under the covenants, for a defect of title known to and fraudulently concealed by him. *Edwards* v. *M'Leay*, G. Coop. 308; 2 Swanst. 289: *Gibson* v. *D'Este*, 2 You. & C. C. C. 542; *Vigors* v. *Pike*, 8 Cl. & Fin. 562. Vide ante, p. 3, and Vol. 8.]

Accepting defective title not a "neglect or default." *Woodhouse* v. *Jenkins.*

The word "privity."

[Assenting to an act, which the covenantor could not have prevented, is not within a covenant that he had not done or executed, or knowingly or willingly *permitted or suffered* to be done, any act whereby, &c. *Hobson* v. *Middleton*, 6 B. & Cr. 295, where a covenant against incumbrances by the vendor's trustee for preventing dower, containing these words, was held not to extend to make the trustee answerable for the consequences of the vendor's having previously executed a conveyance of the estate, in which conveyance the trustee joined. Of course, the trustee was answerable for the nominal damages arising from his having conveyed his own estate. It was suggested, that, perhaps, the purchaser might have refused the conveyance, unless it were made with the consent of the trustee; but, as the plaintiff had not alleged that his

Meaning of the words "permit or suffer." *Hobson* v. *Middleton.*

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consent was an ingredient in the transaction necessary to the acceptance of the conveyance, that point was not open. The Court said, that the words "permitting and suffering" do not bear the same meaning as "knowingly of and being privy to." The case shews the importance of these latter words in covenants by trustees.]

Importance of the words "hath not been party or privy to, &c."

[Where a man made a lease for ten years of land, in which another had a copyhold estate for life, and the lessor gave the lessee a bond, with this condition, "that if the lessor *suffer* the lessee, from year to year during the term, quietly and peaceably to have, hold, and occupy the land, *and that* without trouble or denial of the lessor, or *any other person* or persons, that then &c." The lessee entered on the copyholder, who re-entered and ousted the lessee. The Court was of opinion that this was no breach, for all the sequel of the condition depends on the first word, viz. *suffer*, which is a verb passive, so no act to be done by the obligor, but only the sufferance of him, his executors and assigns, notwithstanding the words, and that without trouble, &c., or "any other person," which have a meaning, that the obligee ought to enjoy the lease against all others, &c. But if any procurement or occasion of the disturbance be through the obligee, his executors or assigns, then he hath forfeited the bond, &c.; and the word *that* is translated into Latin *hoc*, which refers to the word *suffer*, as it seems. (Ante, Vol. 2, p. 264); *Anon.* Dy. 255 a: see *Broughton* v. *Conway*, Dy. 240; infra, p. 385.]

Obligation to "suffer" A. B. to enjoy.

What should be excepted out of the vendor's covenant against incumbrances.

It is not usual to except tenancies from year to year at rack rent in a covenant which avers the freedom of the property from incumbrances; but, as such a tenancy constitutes an interest in the land, which does not pass by the conveyance, it is obvious, that, if created by the vendor himself, or any other person to whose acts his covenants extend, the estate of a tenant from year to year ought to be excepted.

Perhaps in no part of deeds has so much inaccuracy prevailed as in framing exceptions of this nature. Thus, while a tenancy, though an interest created by the covenantor, has *not* been noticed, a great variety of incumbrances *not* created by him, as land-tax*, quit-rents, old terms

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* [A distress upon a tenant for land-tax, which the lessor ought to have paid, has been held to be no breach of a covenant for quiet enjoyment without disturbance of or by the lessor, his heirs or assigns, or any person claiming by, from, or under him, them, or any of them, on the ground that it was made by one claiming against him. *Stanley* v. *Hayes*, 2 Gale & D. 411. This is surely a narrow construction. The distress would have been illegal but for the default of the lessor, (and act and default are the same thing for the purposes of these covenants), so that the disturbance was by one claiming by the lessor, and through him, that is, through his act. See *Howes* v. *Brushfield*, ante, p. 378. Suppose a mortgagor to forfeit his equity of redemption by a fraudulent mortgage under the stat. 4 & 5 Will. & M. c. 16, can it be said that the second mortgagee does not claim the equity of redemption "by or through" the mortgagor? So, it is clear, that where a lessee under-lets part of the premises, and commits a forfeiture, this is a breach of a covenant against disturbance by him, or any person claiming by, from, or under him, and yet, notwithstanding the distinction taken by the Court in *Stanley* v. *Hayes*, the entry is by title paramount. (See *Dawson* v. *Dyer*, 5 B. & Ad. 535; *Ireland* v. *Bircham*, 2 Scott, 207). If

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of years attendant on the inheritance, manorial rights, &c., have been improperly introduced†. It is clear, that no subsisting charge or outstanding interest ought to be noticed as an incumbrance which was not created by the person to whose acts the covenants relate, vide ante, Vol. 1, p. 627, n. ; an attendant term of years ought not, *in any case*, to be referred to as such, unless its existence otherwise appears on the face of the deed. Indeed, Sir Edward Sugden condemns the practice of treating an attendant term as an incumbrance at all. It must be remembered, however, that, though the trusts are satisfied, and the term is kept on foot as a protection, it is an outstanding *legal* interest.

Exception strictly construed.

[It has been held, that an exception to an absolute covenant will be construed strictly, as where in a lease for years by tenant in tail, the reversion being in the Queen, the covenant was against the interruptions of all except the Queen, her heirs and successors, existentibus regibus vel reginis Angliæ, and the Queen granted her reversion to W., who, on the death of the tenant in tail without issue, ousted the lessee, it was held to be a breach, for the Queen's patentees were not excepted. *Woodroffe* v. *Greenwood*, Cr. El. 518. Sed quære.]

As to the covenants, where there is a known defect of title.

It is a correct, though not a new observation, that the covenants for title ought never to be relied on as affording protection against an incumbrance, of which the purchaser has notice ; for it seems to be doubtful whether they would extend to such an incumbrance, (see *Savage* v. *Whitebread*, 3 Ch. Rep. 14, (24) ; *Ogilvie* v. *Foljambe*, 3 Mer. 65 ; *Vane* v. *Lord Barnard*, Gilb. 6), unless it be particularly specified ; and this specification it would not be advisable to make, unless the incumbrance otherwise appeared upon the face of the conveyance. (See Butl. Co. Litt. 384. a., n.) In such a case an indemnity should be taken in a separate instrument, and the covenants in the conveyance will be framed in the usual manner ; (see Forms of Bonds of Indemnity from Vendor to Purchaser, ante, Vol. 3, pp. 561—573) : but a covenant is in general to be preferred to a bond, because a bond does not run with the lands.

[A covenant that the vendor is seised in fee-simple, in a conveyance purporting to be of freehold lands, is broken, if it turns out that they are copyhold. *Grey* v. *Briscoe*, Noy, 142.]

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the mesne lessor in the case put were an assignee of the original lease, the parallel would be complete.]

† [The effect of referring to incumbrances paramount the original title of the vendor was, in a modern case, to assist the construction that covenants, otherwise incorrectly framed, were absolute, though intended, no doubt, to be restricted in the usual manner. *Howell* v. *Richards*, 11 East, 633, infra, p. 390. Where the covenants are absolute against the acts of all persons, and rents are specified among the incumbrances from which the estate is to be warranted, it has been held that small quit-rents, incident to the tenure, are within the covenant, *Hammond* v. *Hill*, 1 Com. 180 ; and it should seem they would be equally within it, though it contained the word "incumbrances" only. Of course, the covenant for quiet enjoyment extends to everything that is appurtenant or incident to the grant to which it relates, e. g. a right of way over the grantor's other ground, arising from the necessity of the case. See *Morris* v. *Edgington*, 3 Taunt. 24 ; *Andrews* v. *Paradise*, 3 Mod. 318.]

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Covenant when conditional.

Dawson v. *Dyer.*

[In an *Anonymous case*, 4 Leon. 50, it is said to have been held, (against the opinion of Periam, J.), that where the lessor covenanted that the lessee, *paying his rent*, should enjoy the land demised for the whole term, and the lessee did not pay his rent, an eviction by title paramount was no breach. But, in *Dawson* v. *Dyer*, 2 Nev. & M. 559; 5 B. & Ad. 584, when a lease contained a proviso for re-entry, if the rent should be in arrear twenty-one days, and a covenant that the lessee, *paying the rent* at the times appointed, and performing the covenants, &c. should enjoy &c., it was held, that an eviction by one claiming under the lessor was a breach, though at the time the lessee's rent was in arrear more than twenty-one days. The Court said, that the words were introduced to save the lessor's power of re-entry, and also relied on the rule laid down in *Simpson* v. *Titterell*, Cr. El. 242, that, where to a proviso is annexed a penalty for non-performance, it is no condition, but only a covenant, (see *Doe* d. *Henniker* v. *Watt*, 8 B. & Cr. 308, 1 Man. & Ry. 694), but which seems not to be in point. The construction in *Dawson* v. *Dyer*, is, however, well settled. Vide ante, Vol. 4, pp. 440, 493; and see, as to conditional covenants, *Mattock* v. *Kinglake*, 2 Per. & D. 343; 10 Ad. & E. 507.]

Ireland v. *Bircham.*

Covenant for a quiet enjoyment of a reversionary term.

[In *Ireland* v. *Bircham*, 2 Scott, 207, by indenture of 22nd November, 1815, H., being lessee for thirty years from Christmas 1815, demised to J. for twenty-one years, to expire at Christmas 1836, at a rent of 31*l.* 10*s.* After various assignments, this lease got back to H., who, in 1818, assigned it (or rather created a substitutional term in its place) to another person, who assigned it to the plaintiff. H., in 1823, demised the premises by way of mortgage to the defendant for all the residue of the term of thirty years, except the last day; and, in 1826, H. and the defendant demised to the plaintiff the premises then held by him under the lease of 22nd November, 1815, to hold to him, as from the 25th December, 1836, being the expiration of the term granted by the said existing lease, for the term of nine years, at the rent of 31*l.* 10*s.* The lease contained this covenant, "and each of them, the said defendant and H., severally, and not one for the other of them, doth hereby for himself, &c. covenant with the said plaintiff, &c., that he the said plaintiff, &c. paying the said rent of 31*l.* 10*s.*, and observing the covenants, shall, during the said term hereby demised, enjoy &c., without any disturbance of, from, or by the said defendant and J. Harris, or either of them, their executors &c., or of any person claiming by, from, or under them, or any of them." The plaintiff being evicted in 1827 by the original lessor, by reason of the non-payment of the rent reserved in the original lease, brought this action on the covenant contained in the reversionary lease of 1825. Several points were raised, but the case was decided on the ground that the action was premature. Tindal, C. J., said, that this was a covenant conditional on the payment of the rent, &c., and as the condition could not take effect until the commencement of the term, so neither could the obligatory part of the contract. But the reason seems to have been better put by Gaselee, J., who said, that the action in effect would be for not granting the lease when the period referred to should arrive. The case cannot, at all events, be regarded as an authority against the principle of *Dawson* v. *Dyer*.]

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Operation of restrictive words in covenants.

Whatever be the extent of the covenants entered into by a vendor, care should be taken in preparing them, not only that each covenant is unambiguously expressed, but that they are all made co-extensive; for inconsistencies of this kind are of frequent occurrence, and have given rise to much litigation. The rules to be drawn from the cases on the subject are laid down by Sir E. B. Sugden, (2 Vend. 526, 531), with his usual clearness and precision. The distinction taken by the learned author is, that where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct; but that, where the first covenant is general, a subsequent limited covenant will neither restrain the generality of the preceding covenant, unless an express intention to that effect appear, or the covenants be inconsistent.

[It should be observed, however, that no such rule has ever been judicially laid down or recognised; that the existence of any rule of the kind was expressly denied by Burrough, J., in *Nind* v. *Marshall*, (infra, p. 388); and that, though Sanders, in arguing the case of *Gainsford* v. *Griffith*, (1 Saund. 60), did attempt to lay down a rule to the effect that it depended on the position of restrictive words, whether they should be extended to the whole series of covenants or not, which rule was not denied by the Court; yet that rule as laid down, and as recognised by Buller, J., and semble, also, by Eldon, C. J., in *Browning* v. *Wright*, (infra, p. 386), expressly gave as much weight to the position of these words at the end of the series as at the beginning of it. But all such technical rules, if they ever existed, appear to be now exploded, and in all the cases, ancient as well as modern, with the single exception of the dicta in *Browning* v. *Wright* above alluded to, the courts have always professed to rely on the grammatical connexion of the clauses and the particular scope of each of them, as evidencing the intention of the parties. In some cases, successive clauses relating to the title, right to convey, quiet enjoyment, &c., have been held to be so grammatically connected, that qualifying words in any one part of the series, whether at the commencement or at the end, (*Brown* v. *Brown*, *Nind* v. *Marshall*, *Duke of Northumberland* v. *Errington*, *Sickleman* v. *Thistleton*, *Hesse* v. *Stevenson*, *Rich* v. *Rich*, infra), extended to the whole; in others, two members of a clause, even more intimately connected together, in point of expression, have been held to be so distinct in their objects, that restrictive words in the one did not extend to the other; (*Belcher* v. *Sykes*, *Crayford* v. *Crayford*, *Howell* v. *Richards*, *Saward* v. *Anstey*, *Barton* v. *Fitzgerald*, infra.)

Presumption against absolute covenants.

[It has been laid down, as we have seen, (ante, p. 372), that there is a primâ facie presumption against unlimited covenants for title, in a conveyance of a freehold estate, but that the presumption is considerably weaker, if it exists at all, with regard to leaseholds. It is also settled, that though the words "grant," "demise," "bargain, sell," &c. in conveyances, if unrestrained, operate as absolute covenants for enjoyment in law, (see Cr. El. 157; 13 East, 78; 15 Id. 538; 1 Cr. & J. 445; 1 Per. & D. 360), they will be restrained by an express covenant of a more limited nature. *Nokes's case*, 4 Rep. 806; *Line* v. *Stephenson*, 6 Scott, 447 (*a*); *Stannard* v. *Forbes*, 1 Nev. & P. 633. This rule seems to

(*a*) [In *Line* v. *Stephenson*, Tindal, C. J., said, "It has been con-

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Restrictive words.

Johnson v. *Proctor.*

Bond to perform *grants* and covenants held not to be confined to the covenants.

have been infringed in the case of *Johnson* v. *Proctor*, Cr. El. 309; Cr. Jac. 233; Yelv. 175; 2 Brownl. 212; where J., by indenture, reciting a lease of a mill and land to him and V., and that the whole survived to J., as he conceived, granted the premises and all his estate to P., and covenanted that P. should enjoy it for any act done by him &c., and gave a bond to perform the covenants, *grants*, articles, and agreements, in the indenture. It was held, by two to one, in the C. P., and affirmed in error by the whole Court, that an entry as to a moiety by one claiming under an assignment by the deceased joint tenant, was a breach of the condition. "For, it was not like *Nokes's case*, 4 Rep. 806, for there the grant was once good for the whole, and became bad by eviction after; and therefore, there the covenant subsequent qualified the general covenant; but here, the grant, according to the purport of it, was never good, for of the moiety J. had no power to grant, and yet he has, in his conveyance, expressly granted, by precise words, the mill and land, and therefore the condition of the bond being to perform all grants &c., the grant being defective at first as to a moiety, which is the substance of the agreement of the parties, is not qualified by the subsequent covenant." But see *Broughton* v. *Conway*, Dy. 240, infra, p. 385. If the grant was restrained for the purposes of construction in the indenture itself, it was equally restrained for the purposes of the bond referring to that indenture.]

Nervin v. *Munns.*

Distinct covenants held to be controlled by the others, because inconsistent.

[In *Nervin* v. *Munns*, 3 Lev. 46, Fineux, the feoffor, covenanted, 1st, That, notwithstanding anything by him done to the contrary, he was seised in fee-simple, or in fee-tail, without any condition or limitation to determine his estate. 2nd, That he had full power and good authority to sell it. 3rd, That the lands were clear of all incumbrances made by him, his father, or grandfather. And 4th, the said Fineux covenanted that the feoffee should enjoy against all persons claiming under him, his father, or grandfather. The plaintiff declared, that the feoffor had no power to sell; the defendant pleaded that, notwithstanding anything by him done, he had power to sell. Upon demurrer to the plea, it was admitted by the whole Court that the covenants were distinct and several. North, C. J., said, that the second covenant was absolute, and cited *Crayford* v. *Crayford*, Cro. Car. 106, and *Bennet's case*, Id. 495. But the other three judges said, that the covenants were distinct, the first and second were synonymous and of the same nature, for, if he was seised in fee, he had power to sell; and when by the first cove-

Covenants for title and right to convey are synonymous.

Effect of express covenant in qualifying implied covenants.

tended that, in the present case, in the word 'demise' is implied, not simply one covenant, but two distinct and independent covenants,—a covenant that the lessor has power to grant an instrument of the nature and to the extent of that which he professes to grant, and a covenant for quiet enjoyment. I am not prepared to deny that proposition; but I do not concur in the argument it is thence proposed to draw—that the express covenant for quiet enjoyment qualifies and restrains the generality of the implied covenant as to the second branch, leaving it untouched as to the first. I agree that covenants for title, and for quiet enjoyment, may be so worded as to form distinct and independent covenants. That is all that is decided in *Norman* v. *Foster*, *Howell* v. *Richards*, and the other cases cited on the part of the plaintiff."]

nant he covenants against his own acts, it cannot be intended that immediately by another covenant to the same effect he would covenant against all the world. But, in the cases cited, the covenants are of different natures and concern different things, and here the two subsequent covenants are particular and limited, and therefore the middle covenant shall not be construed indefinite and general. Sed adjournatur.]

Restrictive words.

[We may mention in this place the case of *Belcher* v. *Sykes*, 8 B. & Cr. 185, where, by a deed of dissolution of partnership between A. and B., B. assigned his share of the debts, &c., to A., and for himself, his heirs, &c., covenanted, that, notwithstanding any act done or suffered to the contrary by him, B., it should be lawful for A., his executors, &c., to receive the debts, &c., assigned, without any interruption by B., *his executors or administrators*, or any person claiming under him or them. It was, of course, held, that an interruption by the executor of B. was a breach; the words "notwithstanding any act done by B." being rejected as insensible.]

Belcher v. *Sykes.*

Covenant, that, notwithstanding any act done by B., there should be no interruption by B., his *executors or administrators.*

Words rejected as inconsistent.

[But if the several clauses relate to different matters, they may differ as to their extent without inconsistency; as, where C. covenanted to stand seised of a manor to uses, and covenanted that he was then seised in fee, notwithstanding any act done by him or any of his ancestors, and that no reversion or remainder was in the king or any other, and that the said manor was then of the value of £300 per annum, and that the plaintiff and his heirs should enjoy according to the limitations, discharged from all incumbrances made by C. or any of his ancestors; it was held, that the covenant as to value was a distinct covenant, and not qualified by the first covenant. *Crayford* v. *Crayford*, Cro. Car. The same point was decided in *Hughes* v. *Bennet*, Cro. Car. 495; Sir W. Jones, 403. The court said, the value was properly in the cognizance of the covenantor, and it was not proper to say, that, for anything by him, &c., it should be of such a value, but absolutely that it should be of such a value. See *Nervin* v. *Munns*, ante, p. 384, where the distinction is drawn, that when several covenants relate to the same matter, they shall more easily control each other than when, as in these cases, they relate to different matters.]

Crayford v. *Crayford.*

Covenants relating to different matters held not to control each other.

Hughes v. *Bennet.*

[In *Brown* v. *Brown*, 1 Lev. 57, an absolute covenant that the vendor was seised in fee, and had right to sell, was held to be restrained to the vendor's own acts by "a remote agreement at the end of the deed far distant from the other covenant;" but what the restraining clause was does not appear.]

Brown v. *Brown.*

[In *Broughton* v. *Conway*, Dy. 240; Dal. 58; Moo. 58, a termor granted, demised, and assigned his term, and covenanted that he had not made any former grant or thing whereby his grant or assignment might be impaired, *but that* the assignee, by virtue of that assignment, might enjoy without any disturbance by him or *by any other person;* and gave a bond for performance of all the covenants, *grants*, agreements, and articles contained in the indenture of assignment. Before the assignment, the wife of his lessor had recovered, and obtained execution of a third part in severalty for her dower. It was held to be no breach. Three of the judges held that the sequel of the sentence—"but that," was a continuation, and depended upon the pre-

Broughton v. *Conway.*

"Any other person" restricted by particular words in prior member of the clause.

"But that."

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Restrictive words.

Peles v. *Jervies.*

Browning v. *Wright.*

Restrictive words in the first covenant extended to all the others.

ceding matter (see Dy. 207 a), and so no breach. But Browne è contra strongly. See *Johnson* v. *Procter*, Yelv. 175, ante, p. 384; and *Anon.* Dy. 255 a, ante, p. 380. So, in *Peles* v. *Jervies* (Dy. 240 a, in marg.), tenant pur autre vie leases for years, and covenants that he has not done any act &c., *but* the lessee shall enjoy; the word "but" was held to refer the words subsequent to the words preceding.]

[The doctrine was much discussed in *Browning* v. *Wright*, 2 Bos. & P. 13, where the early cases were reviewed. In that case J. W. granted, enfeoffed, &c., land, habendum to the plaintiff, his heirs and assigns, absolutely and for ever, "and the said J. W. and his heirs, the said piece of land, &c., unto the plaintiff and his heirs, against him the said J. Wright and his heirs, will warrant and for ever defend by these presents." J. W. then covenanted with the plaintiff, his heirs, &c., "in manner and form following, that is to say, that he the said J. W., for and notwithstanding any thing by him done to the contrary, is lawfully seised, &c.; *And that* he hath good right, &c., to convey *in manner aforesaid.* And the said J. W., for himself, his heirs, &c., doth further covenant, &c. (to set out a cart-way); And that the plaintiff may enjoy the land granted without interruption by the said J. W., or any person claiming under him; And lastly, that the said J. W., and all persons claiming under him, will make further assurances." It was held, that the covenant for right to convey was either a member of the preceding covenant, or, if distinct, was controlled by the accompanying covenants. Lord Eldon, C. J., said, that the repetition of the initiatory words of covenant, after the stipulation for the right to convey, would be a ground for holding that stipulation to be but a member of the covenant for title; and Rooke, J., relied on this. See, too, 3 Bos. & P. 574. The Chief Justice, after making some general observations, which have been cited ante, p. 372, said, "My opinion, upon considering the whole deed, is, that this is a special covenant. What would be the use of the other covenants if this were general? It would be of little service to the grantor to insist that the warranty and the covenants for quiet enjoyment and further assurance were specially confined to himself and his heirs, if the grantor were at liberty to say, 'I cannot sue you on these covenants, but I have a cause of action arising upon a general covenant which supersedes them all.' It appears to me, from the words and the context of the deed, that in such case we should be driven to say, that the grantor intended at the same time to give a limited and unlimited warranty. The true meaning, therefore, of the covenant is, that the grantor has power to convey and assure according to the terms used, to which terms he refers by the words 'in manner aforesaid,' namely, 'for and notwithstanding any thing by him done to the contrary.'" (See, as to these words, *Gale* v. *Reed*, 8 East, 87, ante, vol. 3, p. 461).]

["With respect to the cases which have been cited, it is to be observed, that where a general principle for the construction of an instrument is once laid down, the Court will not be restricted from making their own application of that principle, because there are cases in which it may have been applied in a different manner. [See 7 T. R. 148]. The principle being once acknowledged the only difficulty consists in making the most accurate application of it. In *Trenchard's case*, the

estate on which the covenants in question arose was granted under letters patent by the Crown, but those letters patent are not stated in any of the reports. We know, however, that, in grants by the Crown, it is usual to reserve a reversion, which the grantee cannot bar. The grantee having enjoyed the estate for a considerable time, sold to the plaintiff in the action, and entered into three covenants: first, that he was seised in fee; secondly, that he had good power to convey; and thirdly, that there was no reversion in the Crown *notwithstanding any act done by him*. The contest in the cause was, to apply the concluding words of the third covenant to the two prior covenants; there was a great difference of opinion upon the subject, not only between the individual judges, but between the different courts before whom it was argued; and the only ground upon which I can suppose that Court to have proceeded, which decided that the words were not connected with the first covenant, is this, that they considered it to have been the intention of the parties that the vendor should enter into an absolute covenant for his seisin in all cases but one—namely, that he should not be liable on the objection of a reversion existing in the Crown, unless that reversion appeared to have been vested in the Crown by his own acts. The case of *Johnson* v. *Procter*, in Yelv., proceeded on the principle on which this demurrer may be decided, viz., that the covenant is to be construed according to the intention of the parties. There the grantor having stated in the recital that he was interested in the whole of the premises, when, in fact, he was interested in a moiety only, the Court would not permit him to contend that a covenant for quiet enjoyment, 'notwithstanding any act done by him,' was satisfied by a compliance with the mere words of that covenant, in a case where the grantee had suffered eviction, in consequence, not of any act done by the grantor, but of the badness of his title. The recital itself amounted to a warranty*. *Gainsforth* v. *Griffith* was a case of leasehold property. The first covenant there was for an indefeasible title, and was a separate and distinct covenant, and the second was for quiet enjoyment, notwithstanding the assignor's own acts. He seems, therefore, to have said, 'I not only covenant for the goodness of my title, but that you shall enjoy under that title without any interruption from me.' The nature of the assurance

Restrictive words.

Browning v. *Wright.*

Semble that the concluding words of the last covenant may restrain the preceding covenants.

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* [This construction of the case of *Johnson* v. *Procter* may well be doubted. The recital itself appears to have been expressed as a supposition only. To hold that even a positive recital of title is equivalent to an express warranty or covenant, would be to overrule half the cases; and if it is placed no higher than the warranty implied from the word "grant," it was necessarily controlled by the express limited covenants. See 2 Sugd. Vend. 525; *Stannard* v. *Forbes*, 1 Nev. & P. 643; infra, p. 389. See, however, per Lord Ellenborough, in *Barton* v. *Fitzgerald*, 15 East, 541; infra, p. 392. In *Hesse* v. *Albert*, 3 Man. & Ry. 406, an absolute covenant by a husband in a deed of separation to pay £250 per annum to his wife during her life, was held to be restricted by a recital that he had agreed to allow her an annuity of £250 out of his salary as a searcher, during such time as he should hold the situation, the recitals and the operative part mutually referring to each other.]

Effect of recitals.

COVENANTS FOR TITLE.

shews it to have been the intent of the parties that the words in the last covenant should not attach upon the first. Coming lately from a court of equity, I may be allowed to mention a case there, though perhaps not of the highest authority in a court of law. It is the case of *Fielder* v. *Studley*, Cas. tem. Finch, 90. There the deed contained one general covenant for lawful power to convey, but all the other covenants had restrictive words, as here. The grantee having sued the grantor on the general covenant, the Court of Chancery restrained him from proceeding. Now this must have been done on the ground of the intent of the parties appearing on the instrument, since that intent, and the consequent legal effect of the instrument, could only be collected from the instrument itself, and not from anything dehors*. In the same manner, the intent of the parties to the covenant on which this action is brought, is to be collected from the warranty, from the other covenants, and from the primâ facie nature of a purchase of a freehold estate."]

Restrictive words.

Browning v. *Wright.*

[Buller, J., concurred in Lord Eldon's reasoning, and relied on the general intention to be collected from the whole deed, the virtual identity of the covenants for title and for right to convey, and the inconsistency which would result from a contrary construction. Heath, J., went further, and said, "Where any sentence contains distinct covenants, and there are words of restriction, *either in the prefatory or concluding part*, those words must be extended to every part of the sentence, unless the intent of the parties appear to require a contrary construction. This is laid down [arguendo] in 1 Saund. 60. It therefore behoves the plaintiff to shew that it was the intention of the parties that the restrictive words in this case should not extend to the second clause of the sentence." Sed vide infra, p. 395.]

Foord v. *Wilson.*

Restriction on covenant for title extended to covenant for right to assign.

[So, in *Foord* v. *Wilson*, 2 J. B. Moore, 592; 8 Taunt. 543, a deed of assignment of a lease contained the usual recitals of the demise, and of the contract for the sale of the premises for the residue of the term; and the vendor covenanted that he had not done or suffered any act, &c., whereby the premises were or could be impeached, incumbered, or affected in title, estate, or otherwise, *and that notwithstanding any such act*, &c., the lease was valid and subsisting. *And that* the vendor had good right to assign, according to the true intent, &c. *And also*, that the vendor, his executors and administrators, and all other persons claiming under him or them, would make further assurance. The covenant for right to assign was held, on the authority of *Browning* v. *Wright*, to be restricted by the words in the other covenants.]

Nind v. *Marshall.*

[So in *Nind* v. *Marshall*, 3 J. B. Moore, 703; 1 Br. & B. 319, the covenants in an assignment of a lease were, that, notwithstanding any

* [The high character and great accuracy of the reporters alone prevent one from pronouncing at once that Lord Eldon must have been misreported on this point. The rules of construction are the same in courts of equity as in courts of law, and if the intent of the parties appeared on the instrument, there was no need for an injunction. The case, as reported in Finch, cannot be supported; there were probably some equitable grounds. See *Coldcot* v. *Hill*, 1 Ch. Cas. 15, and the other cases cited, ante, Vol. 1, p. 365; and see 3 Bos. & P. 575.]

act, &c., of the vendor, the lease was valid and subsisting. *And further*, that it should be lawful for the purchaser to enter and enjoy, during the term, without disturbance by the vendor, his executors, administrators, or assigns, or any of them, *or any other person or persons whomsoever*, having or lawfully claiming any estate, right, or interest in the premises; *and that* free, &c., from all former and other gifts, &c., whatsoever, made, done, or permitted by the vendor, his executors or administrators. And, moreover, that the vendor, his executors and administrators, and all persons claiming under him or them, would make further assurance. The Court (dissentiente Park, J.) held that the covenant for quiet enjoyment was qualified, not (as in *Gainsford* v. *Griffith*) by the words in the other covenants, but by its own concluding member, "and that free," &c. from incumbrances created by the vendor. Had the covenants stopped short of those words the case would have been the same as in *Barton* v. *Fitzgerald;* and in the case of *Howell* v. *Richards*, infra, where this second member did occur, it was itself unrestricted. The words "all persons whomsoever," might be treated as sweeping words, intended to include such persons as sub-lessees, annuitants, judgment creditors, &c., of whom it might be at least doubtful whether they were included in the description of executors, administrators, and assigns. Burrough, J., said, "The rule laid down in *Gainsford* v. *Griffith*, and referred to in the argument, viz., 'that if a restrictive clause be in the first or last part of a sentence, or at the beginning of the first, or at the end of the last sentence, which in good sense may be applied to one and the other, then it extends to both sentences; but otherwise it is if such sentence be placed in the middle of one or two sentences,' *is not the rule now observed.* Mr. Serjt. Williams says in his note to that case, speaking of the above rule, 'It is questionable whether much regard would now be paid to this mode of construction.' Such a rule has never been acted upon since I have been in Westminster-Hall, on the contrary, it has been always said, that the construction must be governed by the intention of the parties, to be collected from the context matter by a due attention to the whole of the deed or instrument. If the covenant on which the question here arises is considered by itself, I am of opinion that it is a qualified covenant."]

Restrictive words.

Covenant against the acts of any person whomsoever, restricted by subsequent words in the same clause.

No general rule that the position of the restrictive words is essential to their effect.

[Again, in *Stannard* v. *Forbes*, 1 Nev. & P. 633; 6 Ad. & E. 572, J. L. took from G. S. and S. C. a lease of a messuage for eleven years, determinable as to one undivided moiety with the life of G. S., and as to the other with the life of S. C. S. C. died during the term, and J. L. remained in possession of the moiety of S. C. as yearly tenant, and paid rent to the reversioner, after which, by deed reciting the lease as an absolute demise by G. S. and S. C. for eleven years, and that he had contracted to sell the premises to the plaintiff for the residue of the said term, he assigned the entirety to the plaintiff, habendum for the residue of the said term, and covenanted that, notwithstanding any act by him theretofore made, done, committed, or knowingly occasioned, suffered, or omitted to the contrary, the lease was then valid and effectual, and that the same and the term of eleven years therein expressed were in full effect and not determined, &c., or prejudicially affected, otherwise than by effluxion of time, and that the rents &c. had been satisfied &c.; and also that, for and notwithstanding any such act, &c., he had power to assign; and further that the plaintiff might enjoy during the term,

Stannard v. *Forbes.*

Covenants for title in assignment of leaseholds.

COVENANTS FOR TITLE.

Restrictive words.

without interruption, &c., by the said J. L., his executors, &c., or any person claiming under him or them, or by or through his or their acts, deeds, defaults, consent, or privity, and that free and clear, &c., from incumbrances, &c., created or knowingly suffered by him, or any person claiming under him; and moreover, that he, and all persons claiming under him, would execute further assurances. It was held, that the determination of the term as to one moiety, and the payment of rent to the reversioner, were no breach of the covenants. After observing, that decisions were not likely to afford much assistance in questions of this kind, which must always depend on the peculiar language of the instrument to be interpreted, Lord Denman, C. J., said, the true grammatical sense of the words, if it could be ascertained, must prevail, unless there were repugnant clauses. In this case the grammatical meaning was clear. The words, "except by effluxion of time," were indeed unmeaning and superfluous in a covenant against the vendor's own acts, but from that quality in legal documents strong inferences could not be safely drawn. The covenants, in fact, formed one sentence, and the whole series was introduced by qualifying words.]

Howell v. *Richards.*

General words superadded to limited words *in the same clause*, not controlled by similar limited words in other clauses.

[In *Howell* v. *Richards*, 11 East, 633, a vendor's covenants were thus expressed: "And the said J. R. doth for himself and the said Anne his wife, and their and each of their heirs, &c., and the said T. R. (the defendant) and D. R. for themselves respectively, and for their several and respective heirs, &c., do covenant with the said R. H. in manner following, viz., that they the said J. R., &c., for and notwithstanding any act, matter, or thing, by them, or either of them, done to the contrary, are now lawfully seised, &c., without any incumbrances; and also, that they the said J. R., &c., some or one of them, for and notwithstanding any such matter or thing as aforesaid, have good right to convey. *And likewise*, that the purchaser shall enjoy without the lawful let, &c., of or by the said J. R., &c., or any or either of them, their heirs, or assigns, *or of or by any other person or persons* whatsoever, *and that* freely acquitted, &c., by the said J. R., &c., from all former and other gifts, &c., whatsoever, *save and except the chief rent* payable to the lord of the fee, if any such be due." It was held that the covenant for enjoyment free from incumbrances was unrestricted. Lord Ellenborough, C. J., said, that the covenants for title and right to convey were indeed what was somewhat improperly called synonymous covenants, were of the same import and directed to the same object, and so one might properly be qualified by the other. But the covenant for quiet enjoyment was directed to a distinct object. It was an assurance against the consequences of a defective title, and any consequent disturbance. A vendor might suspect or even know his title to be defective, though not by his own act, and also know or believe that the defect was temporary or contingent, or capable of removal, or that little danger of disturbance was to be apprehended from it; and so cautiously covenant in respect of his own acts only for the title, but be willing to covenant absolutely for the enjoyment. There was no case in which it had been said, that the covenant for quiet enjoyment was all one with the covenant for title, or parcel of it, otherwise than as both were parcel of the same deed. The Court was warranted by all the cases in giving effect to the general words of the covenant for quiet enjoyment, which were entitled to more weight in this

Absolute covenant for quiet enjoyment is consistent with limited covenants for title.

Restrictive words.

case, inasmuch as they immediately followed and enlarged the special words of covenant against disturbance by the grantors themselves; and to restrain the generality of those words thus immediately preceded by express words of a narrower import, would be a much stronger thing than to restrain words of like generality by an implied qualification arising out of another covenant, where no such general words occurred. The person using the general words could not forget that he had immediately before used words of a narrower extent. If the covenant containing both the special and the general words stood by itself there would be no pretence for refusing effect to the latter—then why should narrower words in another separate covenant control them? See *Nind* v. *Marshall*, 3 Moore, 721, ante, p. 388.]

General introductory words may extend to all subsequent covenants, though other matter intervenes.

Duke of Northumberland v. *Errington.*

[A general introductory clause may be extended to all the covenants which occur in the subsequent part of the deed, though separated by other matter, if such a construction is not inconsistent with the apparent intention. Thus, in *The Duke of Northumberland* v. *Errington*, 5 T. R. 522, in a lease of a colliery to two jointly, the lessees "for themselves *jointly and severally*, and for their several and respective heirs, &c., covenanted with the lessor *in manner following*, that is to say;" then followed a series of covenants respecting the working of the colliery, then a covenant by the lessor to pay a sum for every ton of coals worked, which allowance the lessee and each of them did agree to accept, &c. It was then provided and agreed, and the lessor did covenant with the lessee, that it should be lawful for them to sell small coal, *they the said lessees* paying *and accounting to the lessor* after the rate, &c., and it was further agreed between the said parties, that an account should be taken every six months, and the monies appearing to be due *should be accounted for and paid by the said lessees, their executors, &c.*, to the lessor at certain times. It was held, in an action against one of the lessees, that this last covenant was severed by the introductory words. Buller, J., said, that, had the lessor's covenants not intervened, it would have been so without doubt, and it was immaterial in what part of a deed any particular covenant was inserted, for in construing it the whole deed must be taken into consideration. See per Lord *Mansfield* in *Kingston* v. *Preston*, cit. Doug. 681; and see 2 Bos. & P. 23: *Gale* v. *Reed*, 8 East, 87, ante, Vol. 3, p. 461.]

Sicklemore v. *Thistleton.*

[In *Sicklemore* v. *Thisleton*, 6 Mau. & S. 9, a lease contained a provision that the lessee should pay interest in case the rent should be in arrear for three quarters, and a covenant by a surety for the lessee, that the lessee should at all times well and truly pay the rent at the respective days before mentioned, and also interest, and should duly perform the covenants; *and that* in case the lessee should neglect to pay the rent, &c., for forty days, the surety would pay it on demand. It was held, that the surety was not liable before the end of the forty days, nor before demand, the latter words pervading and restraining the former. So,

Horsfall v. *Testar.*

in *Horsfall* v. *Testar*, 1 J. B. Moore, 89, a covenant to repair at all times, as often as need or occasion should require, and at furthest within three months after notice, was held to be a covenant to repair after occasion *and* notice.]

Hesse v. *Stevenson.*

[In *Hesse* v. *Stevenson*, 3 Bos. & P. 565, the defendant, by deed-poll, reciting an assignment to him of certain shares in a patent, and that he

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Restrictive words.

Particular words held not to restrain general words in a preceding member of the same covenant.

had agreed to assign certain shares in the patent to the plaintiff, and had assigned them accordingly, covenanted with the plaintiff "that I the said defendant have good right, full power, and lawful and absolute authority to assign the said shares, *and that* I have not by any means, directly or indirectly, forfeited any right or authority I ever had, or might have had, over the same shares." There was a further covenant for enjoyment by the assignee in as ample a manner as the assignor, but this was not stated on oyer of the deed. It was held, that the latter member of the covenant did not limit the generality of the former. Lord Alvanley, C. J., said, "that the cases appeared to have determined, that however general the words of a covenant may be if standing alone, yet, if from other covenant in the same deed it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the court will limit the operation of the general words. Here the deed, after reciting the grant of the patent and the assignment to the defendant, contains a conveyance to the plaintiff, and then follows the warranty in question, which, instead of being framed in the usual and almost daily words where parties intend to be bound by their own acts only, viz. 'for and notwithstanding any act by him to the contrary,' omits them altogether; besides which, the defendant covenants that the assignee shall enjoy the property assigned in as ample a manner as the assignor. *The omission of these words is almost of itself decisive.* The attention of the purchaser is not called by any words to the intent of the vendor to confine his covenant to his own acts. The covenant, that the defendant has paid all the calls, is certainly personal, but the covenant for title is general, and the court ought not to indulge parties in leaving out words which are ordinarily introduced, and by which the real meaning of the parties might be plainly understood. It is asked, if the party meant to covenant for an absolute right to convey, why does he covenant that he has not forfeited such right? To this it may be answered, that the latter stipulation, though unnecessary, is not inconsistent with the former. The rule of construction adopted in *Browning* v. *Wright* has never been carried to such a length as to decide that, because some clauses are introduced into a deed which do not add to the security provided by the other clauses, the security so provided is to be restrained."]

Saward v. *Anstey.*

Covenant to pay a rent-charge for which covenantee was not liable, not qualified by covenant to indemnify him.

[In *Saward* v. *Anstey*, 10 Moore, 55, lands were devised to the plaintiff on condition that he should pay, and charged with, certain annuities to his sisters. The plaintiff sold the lands; and it was contended, that, under a covenant by the purchaser, that he would pay the rents in such manner and form as they were by the said will directed to be paid, *and would save harmless and indemnify* the plaintiff from and against all claims and actions in respect thereof, the plaintiff must allege special damage; but the court held that the covenants were independent. The devisee was not personally liable to pay the rents, so that the clause of indemnity was the really nugatory part of the covenant.]

Barton v. *Fitzgerald.*

General covenant that lease is valid and

[In *Barton* v. *Fitzgerald*, 15 East, 530, a deed of assignment of a lease, reciting the demise for ten years, an assignment of the lease to the vendor, and the contract for the purchase of the premises during the residue of the said term, contained an absolute assignment of the pre-

mises, habendum for the residue of the term in as ample a manner as the vendor might have held the same; and the vendor covenanted that he had not done or permitted any act, &c., whereby the premises were or might be charged, &c., save and except an underlease for three years: and also that the said indenture of lease was valid and subsisting, and not forfeited, surrendered, or otherwise become void or voidable. And further, that the purchaser might lawfully enjoy, &c., without interruption by the vendor, or any persons claiming under him. And lastly, that the vendor would, during the residue of the term, make further assurances, according to the true intent, &c. It was held to be free from all doubt, that the covenant for the validity of the lease was absolute. Lord Ellenborough, C. J., admitted that it was a hard case; said that the recital, that the vendor had an absolute term, might fairly be used to construe every covenant in the deed. (Vide ante, p. 387). The covenant for quiet enjoyment against the acts of himself, or any person claiming under him, would not be rendered unnecessary by construing the previous covenants as absolute, for one related to the title itself, the other to the vendor's own acts subsequent to its vesting in him, as assignments or subleases which would not render the original lease invalid. Thus, all the covenants were rendered operative. Bayley, J., said that the rule was, to construe covenants most strongly against a covenantor. General words might be restricted by other parts of the deed, but the intention must plainly appear. That other words in other parts of the deed might be rendered nugatory by giving the natural meaning to the words of a general covenant was not alone sufficient to restrain them. See *Earl of Clanrickard's case*, Hob. 275.]

Restrictive words.

subsisting, not restricted by particular covenant for quiet enjoyment, &c., or by prior limited covenant against incumbrances.

As to recital of title.

[In *Gainsford* v. *Griffith*, 1 Saund. 51, 58, the assignor of a lease, being himself the lessee, covenanted that the lease was good and indefeasible, and should so stand, remain, and be to the assignee for the residue of the term unexpired, and that the assignee should enjoy without any interruption, &c. of the assignor or his executors or assigns, and acquitted or saved harmless from all incumbrances made, &c. by the assignor, his executors, administrators, or assigns, the rent, &c. only excepted, it was held that the covenant that the lease was indefeasible was not restrained by the words "without interruption," &c. These words could not, indeed, be sensibly referred to the covenant that the lease was indefeasible. But the words "so should remain to the assignee," seem to have amounted to an absolute covenant for quiet enjoyment, inconsistent with the subsequent limited covenant to the same effect, and therefore restrained by it. (*Nervin* v. *Munns*, *Belcher* v. *Sykes*). So that, however intimately the covenant for title and for quiet enjoyment may be connected in expression, it seems that the one may be limited by subsequent inconsistent words, without affecting the other.]

Gainsford v. *Griffith.*

General covenant for title not restricted by limited covenant for enjoyment free from incumbrances.

In the case of *Milner* v. *Horton*, M'Clel. 647, it appeared, that, by indenture of feoffment, Dame H. Horton, relict of Sir W. Horton, and H. S. Ann Horton, conveyed to the plaintiff in fee certain hereditaments, covenanting (without the usual qualifying words "for and notwithstanding, &c."), that they were, or one of them was, lawfully seised in fee, and had good right to grant in manner aforesaid, and that the plaintiff, performing the covenants therein contained on his part,

Milner v. *Horton.*

General covenant for title held to be restrained by subsequent limited covenant for enjoyment.

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Restrictive words.

should quietly hold and enjoy the premises, and receive the rents thereof, "without any let, suit, eviction, or disturbance, *of or by the said Dame H. Horton, or H. S. Ann, or their heirs, or any other person or persons claiming or to claim by, from, or under them or any of them, in anywise*," and that the said premises should remain to the plaintiff in fee, discharged by the grantors, their heirs, &c., from all incumbrances executed "*by them the said Dame H. Horton, and H. S. Ann, or by the said Sir Watts Horton, deceased, or any of his ancestors, or by or with their, her, or his, or any of their means, consent, privity, or procurement.*" It appeared, that, previously to the feoffment, Sir Watts Horton in his lifetime had granted a redeemable rent-charge out of the property, the owner of which distrained on the purchaser*, who then brought an action against Lady Horton on her covenants. The plaintiff's title to recover depended upon the construction of the two first covenants, whether they were absolute and unqualified, as construed independently they clearly were, or whether they were restrained by the subsequent covenant for quiet enjoyment to the acts of the grantors: and the Court decided in favour of the latter construction. Mr. Baron Graham, who delivered the opinion of the Court, after citing the cases of the *Duke of Northumberland* v. *Errington*, 5 T. R. 522; and *Browning* v. *Wright*, 2 Bos. & P. 13, said—"Having gone through the particulars of this indenture, we think it was the evident intention of the vendors to bind themselves by the two first covenants, that the vendees should have a good estate in fee-simple, *so far as vested in them.* It appears to us, that those covenants should be taken in conjunction with that for quiet enjoyment, without any let or disturbance by the parties, or either of them, or their heirs, or any person or persons claiming under them, or either of them; and that you are not to detach a part of the deed which answers your purpose, and give it a construction independent of, and inconsistent with, the remainder of the provisions."

Smith v. *Compton.*

General covenant for title held not to be restored by subsequent limited covenant for quiet enjoyment.

[*Milner* v. *Horton* was overruled in *Smith* v. *Compton*, 3 B. & Ad. 189, where a deed of appointment and release recited the power, and contained a covenant by J. S., the appointor, in manner and form following, that is to say, that the said power is now in full force, and not suspended or extinguished. *And also*, that the said J. S. now hath in himself full power, &c., to appoint and release the premises according to the true intent, &c. *And further*, that the premises shall be enjoyed without the let, suit, hinderance, &c., of or by the said J. S., or of any person claiming by, from, or under him, and that free from all incumbrances, &c., made, &c., by the said J. S., or any persons claiming by, from, or under him. *And also*, for further assurances by J. S., and all persons claiming under him, or by means of any power enabling him to appoint. It was held, that the covenant for power to appoint was absolute. The authority of *Milner* v. *Horton* was impugned by the counsel for the plaintiff. In delivering the judgment of the Court, Lord Tenterden, C. J., said, "Looking at all the cases which were cited

* It is clear that the action might have been maintained upon the covenant against incumbrances, which extended to the acts of Sir Watts Horton, but a defect in the pleadings prevented the plaintiff from recovering upon this covenant.

for the defendant, there is only one, *Milner* v. *Horton*, where a general covenant has been held to be qualified in the manner here contended for, unless there appeared something to connect it with a restrictive covenant, or unless there were words in the covenant itself amounting to a qualification. It is said that an absolute covenant for title is inconsistent with a qualified one for quiet enjoyment; I am not sure that that is so generally, but this, at any rate, is an instrument of a peculiar nature." "We have considered *Milner* v. *Horton* again since the argument, and we cannot feel ourselves bound by its authority."]

Restrictive words.

[So, in an early case, Hale, C. J., said, "If I covenant that I have a lawful title to grant, and that you shall enjoy notwithstanding any one claiming under me, these are two several covenants, and the first is general and not qualified by the second." *Norman* v. *Foster*, 1 Mod. 101; 3 Keb. 246; and Wilde, J., assented, adding, "One covenant went to the title and the other to the possession, an assumpsit to enjoy sine interruptione alicujus, this is, whether by title or by tort; a quiet possession being intended to be the chief cause of the contract." This latter observation answers the objection that the general covenant for title reduces the particular covenant for enjoyment to a nullity: though, certainly, the intention which it assumes is not a very probable one.]

Norman v. *Foster.*

Covenants for title and for enjoyment.

[In *Trenchard* v. *Hoskins*, Winch. 91; Litt. R. 62, 203; 2 Roll. Ab. 250, pl. 4, J. H., who claimed as heir an estate which had been derived from the owner, joined with P. H. in conveying it to the plaintiff; and both covenanted that J. H. was well seised, that he or P. H. had authority to sell, and that there was not any reversion in the crown for any act done by J. H. or P. H., or W. P., or any of them. It was held in error (Whitelock, J., diss.), that the latter words did not restrain the preceding general covenant, but that the covenants were distinct: the Court relied much on the circumstance that J. H. alone was referred to in the first covenant, while J. H. and P. H. were mentioned in the second, and four persons in the third. It seems, however, that the judgment in error was never entered. See 1 Sid. 328; and see this case explained by Lord Eldon, C. J., ante, p. 386.]

Trenchard v. *Hoskins.*

Particular words at the end of one clause not extended to the preceding clauses.

[But where Lord R. covenanted that certain lands conveyed to the plaintiff for her jointure, were of the value of £1,000 per annum, and so should continue, notwithstanding any act done or to be done by him, it was held, that no action lay, because they were not of that value; for qualifying words extended to the time of the covenant made, as well as to the time future. *Rich* v. *Rich*, Cr. El. 43. The qualification, however, seems to have been intended to apply to incumbrances only, and not to the value of the land free from incumbrances, which, though a matter within the knowledge of the covenantor, and therefore proper to be covenanted for, could scarcely be said to be dependant on his acts. See *Crayford* v. *Crayford*, ante, p. 385.]

Rich v. *Rich.*

[From the foregoing review of the cases it will be seen, that no unbending rule can be propounded for determining the effect of restrictive words upon clauses into which they are not actually incorporated. Thus much, however, may perhaps be laid down, that restraining words in one sentence or clause, will be extended to another sentence or clause, in two cases only: viz. 1. Where the grammatical construction requires such explanation, and the nature of the clauses does not oppose it; and

Result of the cases.

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2. When the limiting words would be altogether deprived of any reasonable effect or application, if the general clause were allowed to stand unrestrained. In applying this last principle, it seems to have been agreed, that the covenants for title and for right to convey have the same object, namely, to assure to the purchaser an immediate remedy upon the discovery of any defect in his title, though his enjoyment remains undisturbed. (*Nervin* v. *Munns*, *Browning* v. *Wright*, *Foord* v. *Wilson*). And it appears to have been considered, that the covenants for quiet enjoyment and for freedom from incumbrances, when associated together (for the latter covenant in a different position may amount to a covenant for title), are also covenants directed to the same or a very similar object, scil. the protection only of the actual enjoyment by the purchaser, being an object altogether different from that of the two former covenants, and fulfilled if the purchaser is never disturbed in his possession, notwithstanding he may never have any title at all. So that restrictive words in a covenant for title will usually control a general covenant for right to convey, and vice versâ; and restrictive words in a covenant for quiet enjoyment may (though not perhaps with the same force of inference) restrain neighbouring words referring to freedom from incumbrances generally. In one case, *Belcher* v. *Sykes*, ante, p. 385, we have seen, that, in aid of the obvious intention, restrictive words have been held to be *enlarged* by others of a more extensive import. But restrictive words in a covenant for title or for right to convey will not (where the grammatical construction does not lead to a different conclusion) control a general covenant for quiet enjoyment or for freedom from incumbrances; nor will a general covenant for title or right to convey be restrained by a limited covenant for freedom from incumbrances. *Barton* v. *Fitzgerald*, *Norman* v. *Foster*, *Howell* v. *Richards*, *Smith* v. *Compton*. See *Line* v. *Stephenson*, 6 Scott, 453, ante, p. 383, n.]

The association of an unqualified covenant that the vendor has power to convey with a restricted covenant for the purchaser's peaceable enjoyment, is certainly rather extraordinary, since no eviction could happen without a defect in the vendor's title involving a breach of the former covenant, unless such eviction proceeded from the vendor himself, or his representatives; the possibility of which event, however, prevents the two covenants, in such a case, from being absolutely incongruous. But a qualified covenant as to the power to convey may well consist with an absolute covenant for quiet enjoyment; for there may be a defect of title without an interruption of the enjoyment. And a vendor may reasonably be supposed to say—"Though I will not engage for the strict legal perfection of my title, yet I am confident the defects in it are not such as will occasion an interruption of your enjoyment, and will therefore warrant that enjoyment against all the world." See *Howell* v. *Richards*, 11 East, ante, p. 633.

Covenant that vendor has power to convey important. It supersedes the necessity for covenant that he is seised.

From the preceding observations it will be seen how important are the two first in the series of vendor's covenants; namely, that he is seised and has right to convey, and that a purchaser ought not, as, on account of the smallness of the purchase, and the consequent desire to avoid expense, he sometimes is disposed to do, to rest his security on the covenant for quiet enjoyment alone, whereby he loses the advantage which the covenant in question would give him, of being able to sustain

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an action immediately on the discovery of a defect of title, without waiting until his possession has been actually disturbed—a point which may often be of great importance. The first covenant, however, that the grantor is seised, may safely be and not uncommonly is omitted, being included in the second, that the grantor has power to convey; which, in fact, is more comprehensive, since it applies to cases to which the former is not applicable—as in the instance of a vendor having a power of appointment only, and not an estate, and, moreover, has been held to extend to personal competency, as well as to capacity in point of estate. Thus, where a conveyance was made by a man and wife, and the husband covenanted that they had good right to convey, and the wife was under age, this was decided to be a breach of the covenant. *Nash* v. *Ashton*, Sir T. Jones, 195. The same exact point, of course, can only arise when the covenant relates to the acts of some person or persons other than the covenantor himself; for, in regard to his own acts, the infancy which prevented the operation of the grant of the party would be equally fatal to the obligatory force of the covenant.

Nash v. *Ashton.*

[Two decisions upon the construction of covenants, as to their extent, may be here noticed:]

Cooke v. *Founds.*

Covenant for title as held under former conveyance.

[In *Cooke* v. *Founds*, 13 Car. 2, 1 Lev. 40; 1 Keb. 95, the defendant bargained and sold land which he had purchased of W. and others, (trustees for the sale of delinquents' estates), and covenanted that he was seised of a good estate in fee, according to the indenture made to him by W. This was held to be an absolute covenant. See *Freme* v. *Wright*, 4 Madd. 364, ante, p. 41.]

Rhodes v. *Bullard.*

Covenant that lessee might use a pump while it should stand.

[Where, in a demise of part of a messuage and of a yard, the lessor covenanted, that, during the said term, he would permit the lessee to have a way through a gate not included in the demise, "and the use of the pump in the said yard jointly with the said lessor *whilst the same should remain there*, paying half the expenses of keeping it in repair," it was held that the words in italics amounted to a reservation of a right to remove the pump (which was not included in the demise) during the term. *Rhodes* v. *Bullard*, 7 East, 116. Lord Ellenborough said—"Can we strike out words which are capable of a sensible meaning?" See *Earl of Shrewsbury* v. *Gould*, 2 B. & Al. 487; *Butterfield* v. *Marshall*, Lutw. 192.]

Covenant for further assurance.

[The well-known rule is, that a trustee or assignee in bankruptcy need not enter into any other covenant than that he has not encumbered. 11 Ves. 345; *Staines* v. *Morris*, 1 Ves. & B. 12.] And though trustees generally object to enter into a covenant for further assurance, yet in the case of a sale by mortgagees, where the purchase-money goes into their hands, and in a qualified sense for their own benefit, it seems not unreasonable to require such a covenant from them. Indeed, the objection is frequently urged in a manner which seems to invest the covenant with imaginary terrors; for its actual operation is nothing more than an engagement by a person who has already professedly conveyed property, to execute a further assurance in case the present conveyance should prove to be defective, at the expense of the person requiring such further act. [Some gentlemen are now in the habit of introducing

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a covenant for further assurance into conveyances by trustees, as a matter of course; and, though the requisition is frequently resisted, it seems to be open to no other objection than that is an innovation.]

There is much tautology in the ordinary forms of the covenant for further assurance; for instance, the word *reasonable* or *reasonably* occurs no less than three times. The assurances are to be made upon every "reasonable" request, and they are to be such "reasonable" assurances as the covenantee may "reasonably" require. The use of the word in the third instance renders it superfluous in the first and second.

Incapacity from sickness, an excuse for non-performance.

Pet v. *Cally.*

What is a "reasonable act" within the meaning of this covenant has often been the subject of controversy. In an early case it was held, that a bond for the performance of covenants, one of which was, that A. at all times, at the request and charges of B., should make, execute, and suffer such reasonable assurances of certain lands to B., or his heirs, as he or they should reasonably require, (which words extended to the levying of a fine or removal of a judgment, &c. *King* v. *Jones*, 5 Taunt. 418), was not broken by the neglect to levy a fine, which was prevented by A. having become non compos mentis; on account of which, the Justices of Assize refused to take her acknowledgment: for it was said, "the words are general, to make such reasonable assurances, which &c.; but if the words had been special, to acknowledge a fine, there, if the Justice doth refuse to take such acknowledgment, the bond is forfeited, for the party hath taken upon him that it should be done." *Pet* v. *Cally*, 1 Leon. 304. But even where the covenant is expressly to levy a fine, severe sickness, according to another early authority, excuses for the non-performance of it. Thus, in an *Anonymous case* in Moore, 124, it was ruled, that the condition of a bond, that the obligor and his wife should levy a fine, upon reasonable request, was not broken where the performance was prevented by the perilous sickness of his wife; for it was not "reasonable" to require her to levy a fine under such circumstances.

Refusal to do an "unnecessary act" no breach.

Warn v. *Bickford.*

The refusal to do an unnecessary act is not a breach of the covenant in question. Thus, where certain lands had been demised by the defendant to trustees, upon trust, among other things, to raise at a contingent but eventual period 1100*l.*, to be paid to the person to whom one of the plaintiffs was administratrix, or to his wife and children; and the defendant covenanted, on and at the request and costs, and in the manner therein mentioned, to make, do, acknowledge, execute, and suffer, or cause &c. all other lawful and reasonable acts, things, devices, conveyances, and assurances in the law, for further &c. (among other things) raising the said 1100*l.* according to the intent of the indenture, as by the said intestate or his counsel should be advised and required: The Court declared the defendant not bound to comply with the plaintiffs' request that the defendant should direct the trustees to take up at interest the £1100 and pay the same to the plaintiffs, because such an act was an unnecessary act, and therefore not a reasonable act, or one which would be required by law, and consequently not within the terms of the covenant stated. *Warn* v. *Bickford*, 9 Price, 43. However, in an early case, in which it was objected to an action for breach of a covenant for further assurance, in not acknowledging the note of a fine, that it was not shewn that any writ of covenant was depending at

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the time of the request, without which no fine could be levied, the objection was overruled, on the ground, that "whether it was well levied, or to no purpose, was not material; the covenantor was bound to perform his covenant by acknowledging this fine." Another objection taken was, that the fine was levied of more than it ought to have been; but this also was overruled, the circumstance being not material, for, of the residue, the fine was to the use of the conusor himself. *Boulney* v. *Curteys*, Cro. Jac. 251; Moore, 310; and see *Pudsey* v. *Newsam*, Yelv. 44.

Where counsel must advise assurances to be executed.

Where the covenant is to make such assurances as the counsel of the covenantee shall advise, the assurance required to be executed must be shewn to have been advised by counsel; for the plea, quod consilium non dedit advisamentum is said to be a good defence to an action on such a covenant, *Bennet's case*, Cro. El. 9, even though the covenantee who devised the assurance were himself learned in the law. *Rosewell's case*, 5 Rep. 19 b. But it is not necessary that the advice should be given directly to the covenantor. *Higginbotham's case*, 5 Rep. 29 a. The covenant for further assurance, however, now in use, is not couched in the exact terms in question; it is not simply to make such assurances as the counsel of the covenantee shall advise, but as the covenantee *or* his counsel shall advise and require. According to the literal import of the covenant, therefore, the language of which is alternative, it would be sufficient that the act were required by the covenantee, though not advised by his counsel; but, as this reduces the latter branch of the clause to silence, (for, if the advice of counsel is not requisite, why is it referred to at all?) in all probability the several members of the sentence would be construed as cumulative; and certainly a person would be very ill advised, who, relying on the contrary construction, should bring an action on the covenant for the non-performance of an act which had not been advised by counsel. In the demand or request to the covenantor to execute any given assurance, which will necessarily precede any action on the covenant, the fact of its having been so advised ought to be noticed and made evident to him. A distinction is taken, in one of the cases, between the words "advise" and "devise;" the former, it was thought, only requiring that counsel should advise generally on the nature of the assurance, the latter, that he should prepare the instrument tendered for execution. *Stafford's case*, Moore, 595; *Stafford* v. *Bottorne*, Cro. El. 298; see 9 J. B. Moore, 215.

Opportunity should be given to the covenantee to examine the assurance required to be executed.

A covenantor called upon to make further assurance, should have an opportunity of examining the contents of the instrument he is required to execute; and it would be prudent to send him the draft of the intended instrument, for perusal, according to the present course of practice. In *Bennet's case*, Cro. El. 9, A. covenanted with B. to make such assurance as his counsel should advise; and the Court held clearly, that B. must give notice of the assurance; for otherwise, A. doth not know his counsel, or their advice; and B. is not only to shew him the assurance that he is to make, but is to permit him to read it, and to go to his own counsel to consider it; and A. is to have convenient time, after the assurance shewn to him, to perfect it. See *Manser's case*, 2 Rep. 3; 4 Leon, 62.

It seems, that if a man undertakes to make an assurance by a certain

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day, he is bound to do it without any request, [*Halling* v. *Connard*, Cr. El. 517; 5 Rep. 22; see *Blicke* v. *Dymoke*, 9 J. B. Moore, 203,] though if an assurance be tendered, he must execute it; and even if it is to be at the costs of the covenantee, the first act must proceed from the covenantor, namely, to notify to the covenantee what manner of assurance he will make, that he may know what money to tender. Shepp. Touch. 167; 11 Mod. 400; Holt, 177; *Heron* v. *Treyne*, 1 Ld. Raym. 750.

This reasoning, of course, only applies where the covenant does not specify the nature of the assurance; [but see *Halling* v. *Connard*;] but, where it does, it would be advisable for the covenantor to intimate his readiness to perform the covenant on receiving the costs. [But where a mortgage was made by husband and wife, in the form of an absolute sale for £600, with a separate defeasance by which the mortgagee covenanted with the husband and wife to make to them and to the heirs of the husband, such assurance as they or their counsel should devise within one year next ensuing, with a proviso that if the vendee made default in the assurance, then if he did not pay to the vendors within the said year £500, he and all others should stand seised to the use of the husband and wife, and the heirs of the husband. It was held, no money having been paid or assurance devised or tendered within the year, that the land should remain with the vendee. *Windsor's case*, Dy. 361, n.; see *Goodisson* v. *Nunn*, 4 T. R. 761. Where the covenant is to execute such an assurance as shall satisfy the covenantee's counsel, it seems that the covenantor must tender the assurance; *Baker* v. *Bulstrode*, 2 Lev. 95; 1 Mod. 104; but where it is to make such assurance as the covenantee's counsel shall advise, then the covenantee must tender the deed. *Lamb's case*, 5 Rep. 22.]

As to executing distinct assurances.

Another distinction laid down in the early authorities is, that where the covenantor binds himself, at his own costs, to make such an assurance of all his land, as another shall devise and require, he is not obliged to execute several assurances of distinct parts; but, contra, where the assurances are to be at the costs of the person requiring them. *Washington* v. *Burgon*, Moore, 570. But questions of this nature are precluded by the present form of the vendor's covenant for further assurance, which throws upon the purchaser, as well the expense of preparing, as the task of devising and tendering the assurances to be executed. [When the covenant is silent as to the costs of the assurance, it seems they must be paid by the party to whom it is made. *Goldney* v. *Curtiss*, 1 Bulst. 90.]

Effect of the restrictive words usually added to a covenant for further assurance.

Under a covenant for further assurance, the covenantor cannot be required to enter into *any* covenants or warranty of title whatever. Thus, in *Coles* v. *Kinder*, Cro. Jac. 571, where A., in consideration of 20*l.*, having promised to assure lands by such reasonable assurance as by B. should be advised and required, refused to execute an indenture of feoffment, with covenants against his own incumbrances, and for further assurance. B. brought an action of assumpsit. The defendant demurred, on the ground, that, though he was to make assurance, he was not to be bound by any covenants; and of this opinion was the Court, it being observed, that, "although these covenants are ordinary and reasonable, yet the agreement, not being to make it with reasonable covenants, but only reasonable assurance, he is not bound to seal it, for

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it is not any part of the assurance ; and the assurance may be without any covenants*." So, in *Stanroyde* v. *Locock*, Cro. Jac. 115, it was held, that an agreement to make such further assurance of certain lands as D. should advise, was not broken by a refusal to enter into an obligation of 40*l.*, as advised by D., for the enjoyment of the lands against all persons. The consequence of this doctrine is, that the words frequently introduced at the end of this covenant, "so as such further assurances shall not contain or imply any other or more general covenant or warranty than against the acts and defaults of the person or persons making the same," instead of being restrictive, have a precisely opposite effect; as, by negativing the covenantor's obligation to enter into any covenants extending beyond his own acts, they imply an obligation in him to enter into covenants embracing those acts. See 15 Ves. 263.

[But in *Lassels* v. *Catterton*, 1 Mod. 67, upon an action in a covenant to make such further assurance as counsel should advise, it was objected, that the conveyance advised contained all the usual covenants and a warranty. Twisden, J., said, "I know it hath been held, that if a man be bound to make any such reasonable assurance as counsel shall advise, usual covenants may be put in, for the covenant shall be so understood. But there must not be a warranty in it, though some have held that there may be a warranty against himself; but I question whether that will hold." If, under his covenant, a vendor is bound to procure a conveyance or assignment from a trustee, no doubt he would be bound to procure that trustee to covenant that he has not incumbered. The meaning of the rule is, that, as far as regards mere matters of *contract*, the covenants in the original conveyance contain all the contracts that the vendor is bound to enter into—for it would be absurd that he should contract with A. that at a future time he will enter into such further contract with A. as his present contract implies. But, for the purpose of facilitating the *remedy* upon his original contract, further covenants might not unreasonably be required ; as, if the vendor's covenants did not originally run with the land, and the means of making them do so subsequently occurred, he would probably be held bound to enter into new covenants, to the same effect, of course, as the original ones.]

The covenant for further assurance does not entitle a purchaser, who has neglected to obtain evidence of facts material to his title at the time of his purchase, afterwards to call for the production of such evidence, or to have the future preservation and production of the documents containing the evidence secured to him. *Hallett* v. *Middleton*, 1 Russ. 243, 256 ; ante, p. 93. So, if the purchaser has omitted to take a covenant for the production of deeds, he cannot, under the covenant for further assurance, require the vendor to enter into such a covenant. See *Fain* v. *Ayers*, 2 Sim. & Stu. 533 ; ante, p. 98 ; Vol. I., p. 102.

* [This case would not probably be now followed to its full extent. Both at law and in equity a contract to sell is understood to include a contract to enter into the usual covenants. Indeed it is for the vendor's advantage that this should be so, as his conveyance would otherwise imply an absolute covenant for enjoyment. Vide ante, p. 372.]

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Actions on covenants.

[In an action upon the covenant for title or for right to convey, the breach may be assigned in as general terms as the covenant, so that it is not necessary to allege any eviction*. *Bradshaw's case*, 9 Rep. 60 b.; *Salman* v. *Bradshaw*, (*S. C.*), Cro. Jac. 304; *Muscot* v. *Ballet*, Id. 369; *Lancashire* v. *Glover*, 2 Show. 460; *Nash* v. *Aston*, Skin. 42; 2 Wms. Saund. 181 a. Consequently, the Statute of Limitations commences to run against the covenantee from the execution of the conveyance. But where the covenant is for quiet enjoyment, the right to sue first arises when the covenantor is evicted or disturbed in his possession, and (with the exceptions noticed ante, p. 376), the adverse title of the disturbing party must be stated in the declaration. *Wotton* v. *Hele*, 2 Wms. Saund. 177, 180 *c.*, n.; *Brookes* v. *Humphreys*, 6 Scott, 756. Upon such covenants, the Statute of Limitations does not run but from the time of the breach, and then only in respect of that breach; so that if the covenantor is disturbed and recovers possession, and is afterwards disturbed again under a claim within the covenant, a new right of action accrues. If the covenant against incumbrances is in the usual form, that the purchaser shall enjoy free from incumbrances, there is no breach until the incumbrance is brought upon him, (*Vane* v. *Lord Barnard*, Gilb. Eq. R. 6); but if it is, that the estate is free from incumbrances, as in the common form of a trustee's covenant, then, if there are incumbrances, the covenant is broken at the moment of making it. *Hamington* v. *Rydear*, 1 Leon. 92.]

Operation of Statute of Limitations.

Whether purchaser can recover improved value.

[If the purchaser has made improvements, he must state the special damages in his declaration, and it is very doubtful whether, as a general rule, he is entitled even in such case to recover them. *Lewis* v. *Campbell*, 3 J. B. Moore, 35; see *S. C.* 3 B. & Al. 392.]

Costs.

[Where the purchaser compromised an action brought against him by a party having a better title, it was held that he might, in an action against the vendor on his covenant for title, recover the whole sum so paid, and his costs as between attorney and client in the compromised suit, although he had given no notice of that suit to the defendant. *Smith* v. *Compton*, 3 B. & Ad. 407. For the purpose of giving notice is, not to give a ground of action, but, if a demand be made and after no-

As to suing on defeat before eviction.

*[In *King* v. *Jones*, 5 Taunt. 418, an action was brought by the heir of the purchaser against executors of the vendor on the covenant for further assurance, the breach being, omission to procure the vendor's wife (to whom the estate belonged) to levy a fine. The purchaser had requested the vendor to perform his covenant, and, on the death of the vendor, his widow entered. Heath, J., referring to the omission of the purchaser to sue during the coverture, said, "It was wise so to do until the ultimate damage was sustained, for otherwise he could have recovered the whole value." It would certainly be difficult in such a case to allow the purchaser to recover the full value, and to keep such title as he might have got, (but see per Mansfield, J., 5 Taunt. 426), and therefore it is generally better to wait until eviction, and then to sue either on the covenant for quiet enjoyment, or, if the case will support it, on that for further assurance; which covenant, it will be observed, being generally to make further assurance *on request*, cannot be broken until request is made, and every new refusal upon request will be a new breach.]

tice the party bound to indemnify refuse to defend the action, he is estopped from saying that the claim was not lawful, or was improvidently compromised. Per Buller, J.; *Duffield* v. *Scott*, 3 T. R. 374.]

Actions on covenants.

[There can be no proof in bankruptcy upon a breach of covenant for which damages only can be recovered, even though the performance of the covenant is secured by a penalty (as distinguished from liquidated damages, vide ante, Vol. 3, 325), because the penalty is liable to be reduced to the amount of the actual damage, (ante, Vol. 3, p. 315), and therefore the bankrupt's certificate is no bar to an action upon a breach of a covenant for title committed before the bankruptcy. *Hammond* v. *Toulmin*, 7 T. R. 612; *Ex parte Maclean*, 2 Mon. D. & De G. 564. See *Mills* v. *Auriol*, 1 H. Bl. 432. Vide ante, Vol. 4, p. 172.]

Bankruptcy no bar to action on covenant broken.

[When the title fails altogether, and the claim has to be enforced against the covenantor's assets in equity, an issue must be directed to try the amount of the damages, unless the parties consent to refer it to the Master. *Wade* v. *Paget*, 1 Br. C. C. 368. But so far as it is in the vendor's power to remove any defect, the covenant for further assurance entitles the purchaser to specific relief; and this right is somewhat similar in effect to an estoppel, binding the estate itself in the hands of the party bound by the covenant, though he has acquired it subsequently by purchase for valuable consideration. See *Vane* v. *Lord Barnard*, Gilb. Eq. Rep. 6; and ante, Vol. 8, and Vol. 3, p. 430, n.: *Averall* v. *Wade*, Ll. & G. cas. tem. Sugd. 260.]

Relief in equity on covenants for title.

When covenants for title run with the land, actions for the breach of them should be brought and releases of such covenants or such actions should be made, by the *real* representatives of deceased covenantees, in whom the land is vested, and not by the personal representatives, although the cause of action may have originally accrued in the lifetime of the covenantee, provided the land be still affected by the breach. *Kingdon* v. *Nottle*, 1 Mau. & S. 355; 4 Id. 53: *King* v. *Jones*, 1 Marsh. 107; 5 Taunt. 418: [ante, p. 356, *Vyvyan* v. *Arthur*, 1 B. & Cr. 410. See as to continuing breaches of covenants, *Doe* d. *Ambler* v. *Woodbridge*, 9 B. & Cr. 376; 4 Man. & Ry. 302: *Vivian* v. *Campion*, Holt, 178; 1 Salk. 141.] But if the deceased covenantee has been actually evicted in his lifetime, the right of action devolves to his personal representatives, as the real subject, to which in the former case such right is annexed, is gone, leaving nothing in the covenantee but a claim to damages, which of course is personal. Thus, where an action was brought by the executor of a vendee of lands for a breach of a covenant for quiet enjoyment entered into with the testator, his heirs and assigns, and the defendant contended that the action ought to have been brought by the heirs or assigns who had sustained the damage, and not by the executor; it was ruled by the Court, that the testator having been evicted, he could have no heir or assign of this land, but the damages should be recovered by the executor, although executors were not named in the covenant, for he *represents the person of the testator*. *Lucy* v. *Levington*, 2 Lev. 26; 1 Vent. 175. [See *Wade* v. *Paget*, 1 Br. C. C. 363. So, where the owner of the fee excepted timber trees out of a demise, and the lessee covenanted not to fell or top them, it was held that, for a breach of that covenant in the lifetime of the lessee, his executors

By whom actions on covenants for title should be brought.

COVENANTS FOR TITLE.

Actions on covenants.

might sue. *Raymond* v. *Fitch*, 2 Cr. M. & R. 508. But if the eviction or disturbance is not by one claiming the entire interest, but only by an incumbrancer, the action belongs to the heir, and not to the executor; and where there is a mere covenant to convey, and no conveyance executed, the action goes to the heir. *Wootton* v. *Cook*, Dy. 237; Anders. 53; Fitzh. N. B. 145 c. In that case, however, the agreement was under seal, and expressly made with the heirs of the purchaser. But in a modern case, where the contract was not under seal, it was held that the administrator of the purchaser might maintain an action on a breach of the contract in the purchaser's lifetime to recover the expenses of investigating the title and interest on the deposit. *Orme* v. *Broughton*, 4 Moo. & Sc. 417: and in *Knights* v. *Quarles*, 4 J. B. Moore, it was held, on demurrer, that an administrator had a right of action against an attorney for accepting a bad and defective title to freehold hereditaments, in the lifetime of the intestate, whereby his personal estate was much injured.]

To whom damages recovered by a tenant for life belong. *Noble* v. *Cass.*

Where a tenant for life recovers damages for a breach of covenant affecting the land, the damages so recovered are his absolute property, and no part of them belongs to the remainderman. Thus, where an estate had been devised to trustees for the life of A., and after her decease to the use of her children living at her death, and the trustees brought an action against a person to whom the testatrix had granted a lease of the premises for dilapidations, and obtained a verdict for 500*l*., which the trustees invested in the public funds. After the death of A. the children claimed the capital of this fund, but it was held to belong to her administratrix. Sir L. Shadwell, V. C., said, that it had been urged in the argument, that the damages were something accruing to the inheritance: but no authority had been produced to shew that a Court of equity had ever held that damages were anything but the personal estate of the person who recovered them; and that he should be introducing a new equity, if he were to hold that damages recovered in an action for a breach of a covenant running with the land, were to be considered as part of the inheritance. *Noble* v. *Cass*, 2 Sim. 343.

Remarks upon *Noble* v. *Cass.*

In order to sustain the doctrine contended for by the plaintiff in *Noble* v. *Cass*, it should have been made out that the tenant for life bringing an action for an injury done to the land represented the inheritance, in regard to his claim to damages; whereas it is conceived the fact is clearly otherwise, for the damages recovered by him, if the breach of covenant affected the entire inheritance, would be proportioned to the extent of his estate only, and the defendant would be liable to another action at the suit of the remainderman for his share of the injury. Considered in this point of view, the soundness of the decision of the Vice-Chancellor is apparent.

56. [RELEASE *of* FREEHOLDS *and* COVENANT *to* SURRENDER COPYHOLDS. *Variation where the copyholds are already surrendered, and the vendor covenants for the title* (*a*). (*A very short form*).

56. RELEASE OF FREEHOLDS, AND COVENANT TO SURRENDER COPYHOLDS. (SHORT FORM).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of &c., of the first part; [*purchaser*], of &c., of the second part; and [*trustee*], of &c., of the third part. WHEREAS the said [*vendor*] hath agreed to sell to the said [*purchaser*] the freehold and copyhold hereditaments hereinafter described, for an estate in fee-simple in possession, unincumbered (except as hereinafter mentioned,) for £—— (*b*). NOW THIS INDENTURE WITNESSETH, that, in consideration of £——, (part of the said sum of £——, apportioned as the price of the freehold hereditaments), by the said [*purchaser*] to the said [*vendor*] already paid, the said [*vendor*] DOTH by these presents (made in pursuance of the statute for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties) release unto the said [*purchaser*] and his heirs, ALL (*parcels*), (all which hereditaments and premises [*devisor*], late of ——, devised unto the said [*vendor*] and heirs by his last will, dated the —— day of ——, and proved at Taunton in the county of Somerset), together with all the appurtenances to the said hereditaments and premises, or any of them, now or heretofore in fact or reputation belonging. AND all the estate and interest at law and in equity of the said [*vendor*] in the said

Parties.

Recital of contract for sale.

Testatum.

Vendor, in consideration of apportioned price,

Releases freeholds.

(Short reference to title by devise.)

General words.

All the estate.

(*a*) [This is the preferable course. Vide ante, p. 187. The deed conveying the freeholds will not require a deed stamp in addition to the ad valorem stamp, on account of the extension of the covenants to the copyholds; the original contract being for a good title to the freeholds and the copyholds, the covenants as to the copyholds are, equally with those as to the freeholds, "incident to the sale and conveyance of the *property sold*." It is understood that the contrary is asserted at the Stamp-office. The error has perhaps arisen from inattention to the circumstance, that "the property sold" includes not the freeholds alone but also the copyholds. See *Doe* d. *Phillipps* v. *Phillipps*, 3 Per. & D. 603.]

Stamp.

(*b*) "AND WHEREAS the said [*vendor*] hath accordingly this day surrendered into the hands of the lord of the manor of ——, in the county of —— ALL (*short description of copyhold parcels*), TO SUCH USES as the said [*purchaser*] should by deed, revocably or irrevocably, or by will, appoint, and subject thereto TO THE USE of the said [*purchaser*], his heirs and assigns for ever."

Variation where copyholds are already surrendered.

56. RELEASE OF FREEHOLDS, AND COVENANT TO SURRENDER COPYHOLDS. (SHORT FORM).

hereditaments and premises. To HOLD the said hereditaments and premises unto the said [*purchaser*], and his heirs, (*to uses to prevent dower, ut ante, p.* 198). AND, (*c*) in consideration of £—— (residue of the said purchase-money), by the said [*purchaser*] to the said [*vendor*] already paid, the said [*vendor*], for himself, his heirs, executors, and administrators, covenants with the said [*purchaser*] and his heirs, that the said [*vendor*], or his heirs or assigns, will or shall forthwith surrender into the hands of the lord of the manor of ——, in the county of ——, to the use of the said [*purchaser*], his heirs and assigns, or to such uses as he or they shall direct, ALL &c., (*parcels*), (to which copyhold hereditaments, the said [*vendor*] was on or about the —— day of —— admitted tenant in fee-simple in possession), Together with all the appurtenances to the said copyhold hereditaments and premises now or heretofore in fact or reputation belonging. AND the said [*vendor*], for himself, his heirs, executors, and administrators, and for and against the acts and defaults only of himself, or of the said [*devisor*] deceased, or of any person or persons claiming or to claim through, under, or in trust for them or either of them, covenants with the said [*purchaser*] and his heirs, that the said [*vendor*] hath power and authority to convey (*d*) and surrender the said freehold and copyhold hereditaments and premises respectively in the manner and to the uses aforesaid according to the intent hereof; *And that* the same freehold and copyhold hereditaments and premises shall henceforth be held and enjoyed accordingly, free from all incumbrances, (except a demise of the said freehold hereditaments by indenture dated the —— day of ——, and made between &c.); *And* shall, from time to time, and at any time or times hereafter, at the costs of the person or persons requiring the same, be further and more effectually or satisfactorily assured to the uses aforesaid, or otherwise, by such acts, deeds, surrenders, or other assurances as the said [*purchaser*], his heirs or assigns, shall reasonably require to be done, executed, or made. As WITNESS the hands and seals of the said parties.]

Covenant to surrender copyholds.

Covenants for right to convey.

—quiet enjoyment,

—free from incumbrances,

and further assurance.

(*c*) [If the copyholds are already surrendered, this covenant will of course be omitted.]

Variation where copyholds are previously surrendered.

(*d*) "the said freehold hereditaments, and, at the time of surrendering the said copyhold hereditaments, had power and authority to surrender the same, to the uses aforesaid, according to the intent hereof and of the said surrender respectively; *And that* the same" &c., (*ut supra*).

57. [RELEASE *of* FREEHOLDS by DEVISEES FOR LIFE, *one of whom has the* ULTIMATE REVERSION *in* FEE, *subject to* CONTINGENT ESTATES TAIL *limited to* UNBORN CHILDREN. *The Purchase-money is invested in Stock, transferred into the Names of Trustees, upon trust to pay the Dividends to the Parties interested, and, if the Purchaser is evicted, to re-transfer the Fund to him.*

57. FREEHOLDS, INDEMNITY AGAINST CONTINGENT ESTATES TAIL.

THIS INDENTURE, made the —— day of ——, BETWEEN [*first tenant for life*], of &c., and [*husband of second tenant for life*], of &c., and [*wife*], his wife, of the first part; [*purchaser*], of &c., of the second part; and [*trustees* (*one of them being made dower trustee*)], of &c., of the third part. WHEREAS [*testator*], late of —— &c., now deceased, in and by his last will bearing date &c., devised all his lands and hereditaments (including the hereditaments hereinafter described) unto and *to the use* of the said [*first tenant for life*], for his life, without impeachment of waste, with remainder to trustees during his life, in trust to preserve contingent remainders, with remainder *to the use* of the first and other sons of the said [*first tenant for life*], successively, and the heirs male of their respective bodies with remainder *to the use* of the said [*wife*], for her life, without impeachment of waste, with remainder to trustees during her life, in trust to preserve contingent remainders, with remainder *to the use* of her first and other sons successively and the heirs male of their bodies, with remainder *to the use* of the said testator's right heirs. AND WHEREAS the said testator died on the ——day of ——, leaving the said [*wife*] his only sister and heiress-at-law, and his said will was, on the —— day of ——, proved in the —— court of ——. AND WHEREAS neither of them the said [*first tenant for life*] and [*wife*] hath had any son. AND WHEREAS (*a*) the said [*pur-*

Parties.

Recital of will.

Death of testator. Heirship.

Contract for purchase;

(*a*) [If the parties are willing to try the experiment of stating the consideration for the purchase to be so much stock, in order to avoid the ad valorem stamp duty (vide ante, p. 181), instead of the recital in the text, say—

"AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendors*] for the absolute purchase of the inheritance in fee-simple of and in the said hereditaments and

Variation where the consideration is the transfer of stock.

57. FREEHOLDS, INDEMNITY AGAINST CONTINGENT ESTATES TAIL.

chaser] hath contracted with the said [*vendors*] for the absolute purchase of the inheritance in fee-simple of and in the said hereditaments hereinafter described, subject nevertheless to the said contingent estates in and by the above-recited will so limited as aforesaid, at or for the price or sum of £—— sterling, to be applied and invested in manner and upon the trusts hereinafter mentioned. AND WHEREAS upon the treaty for the said purchase, it was agreed that, in order to indemnify the said [*purchaser*] and his heirs against the claim of any such son or sons, or of their respective issue male (*b*), the said purchase-money or sum of £—— should be placed out at interest upon government securities or parliamentary funds in the names of them the said [*trustees*] upon the trusts hereinafter mentioned. AND WHEREAS the said [*purchaser*], with the consent and approbation of the said [*vendors*], (testified by their executing these presents), hath, in pursuance of the said agreement (*c*), this day laid out and invested the said sum of £—— in the purchase of £——, 3*l.* per centum Consolidated Bank Annuities, which he hath caused to be transferred into the joint names of the said [*trustees*], and the same is now standing in their joint names in the books of the governor and company of the Bank of England, as they the said several [*trustees*] do hereby severally admit and acknowledge. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreements, and (*d*) in consideration of the sum of £——3*l.* per centum Consolidated Bank Annuities being so purchased

subject to contingent estates.

Agreement to invest £—— as an idemnity.

Investment accordingly.

Testatum.

In consideration of investment.

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premises, in consideration of £—— 3*l.* per centum Consolidated Bank Annuities being transferred by the said [*vendors*] in manner and upon the trusts hereinafter mentioned."

(*b*) [If the transfer of the stock is to be stated as the consideration, as in the previous note, say—
"the said sum of £—— 3*l.* per centum Consolidated Bank Annuities should be transferred into the joint names of the said [*trustees*] upon the trusts hereinafter mentioned."

(*c*) "this day caused the said sum of £—— 3*l.* per centum Consolidated Bank Annuities to be transferred into the joint names," &c.

(*d*) "in consideration of the said sum of £—— 3*l.* per centum Consolidated Bank Annuities being so transferred by the said [*purchaser*] to the said [*trustees*] as aforesaid, and also in consideration of 5*s.* to each," &c.

57. FREEHOLDS, INDEMNITY AGAINST CONTINGENT ESTATES TAIL.

and transferred by the said [*purchaser*] to the said [*trustees*] as aforesaid, the (said sum of £—— sterling, so invested as aforesaid, being the full consideration for the purchase of the fee-simple of and in the said hereditaments, subject nevertheless and without prejudice as aforesaid), and also in consideration of 5*s.* to each of them the said [*vendors*] already paid by the said [*purchaser*], they the said [*vendors*] *Do*, and each of them *Doth*, by these presents, made &c. (*ut ante, p.* 72), grant, release, and confirm unto the said [*purchaser*] and his heirs, ALL (*parcels, and general words*), And all the estate &c. TO HOLD the said hereditaments and premises unto the said [*purchaser*] and his heirs for ever, subject nevertheless and without prejudice to the said contingent estates and interests by the said will so limited as aforesaid, but without impeachment of waste during the respective lives of the said [*tenants for life*], TO SUCH USES, (*uses to prevent dower, ut ante, p.* 73). AND the said [*first tenant for life*], for himself, his heirs, executors, and administrators, and for and against the acts and defaults of himself, and of the said [*testator*] deceased, and of all persons claiming or to claim by, from, through, under, or in trust for them or either of them, and so far only as concerns the title to, right to convey, quiet enjoyment, freedom from incumbrances, and further assurance of the said hereditaments and premises during the term of the natural life of the said [*first tenant for life*]; And the said [*husband*], for himself, his heirs, executors, and administrators, and for and against the acts and defaults only of himself, and of the said [*wife*], his wife, and of the said [*testator*] deceased, and of all persons claiming or to claim by, from, through, under, or in trust for them or any of them, and so far only as concerns the title to, right to convey, quiet enjoyment, freedom from incumbrances, and further assurance of the said hereditaments and premises from and immediately after the determination of the estate for life of the said [*first tenant for life*]; Do hereby respectively covenant with the said [*purchaser*] and his heirs in manner following, (that is to say), that the said [*first tenant for life*] is lawfully and rightfully seised of the present and immediate estate of freehold in the said hereditaments and premises for and during the term of his natural life; *And that* the said [*husband*] and [*wife*], his wife, in right of the said [*wife*], are or one of them is also seised of the same hereditaments and premises in remainder expectant on failure of issue male of the

Vendor's release.

Parcels.

Subject to contingent estates.

To uses to prevent dower.

Specially qualified covenants, for title;

57. FREEHOLDS, INDEMNITY AGAINST CONTINGENT ESTATES TAIL.

body of the said [*tenant for life*], and failure of issue male of the body of her the said [*wife*], for a good and indefeasible estate of inheritance in fee-simple in possession, free from all incumbrances whatever; *And that* the said [*vendors*] now have in themselves good right to convey the said hereditaments and premises to the said [*purchaser*] and his heirs, to the uses and in manner aforesaid, according to the true intent and meaning of these presents; *And further that* the said hereditaments and premises shall, from time to time, and at all times hereafter, remain to the uses aforesaid, and be peaceably and quietly held and enjoyed accordingly, (subject nevertheless, and without prejudice as aforesaid), and that free and clear, or otherwise well and sufficiently saved, defended, and kept harmless from and against all former or other estates, rights, titles, charges, and incumbrances whatsoever, (other than and except the said contingent estates and interests in and by the said will of [*testator*], deceased, so limited as aforesaid); *And moreover, that* they the said [*vendors*] respectively, and their respective heirs, and all other persons whosoever, lawfully or equitably claiming or to claim any estate, right, title, charge, or interest in, to, or upon the said hereditaments and premises, or any of them, from, through, under, or in trust for them or the said [*testator*], deceased, or any of them, (other than and except the first and other sons of the said [*first tenant for life*] and [*wife*] respectively, and the heirs male of the respective bodies of such first and other sons, in respect of their said several estates and interests therein), will and shall from time to time, &c., (*make further assurances, ut ante, p.* 77). AND IT IS HEREBY DECLARED AND AGREED by and between the said parties hereto, that the said Consolidated Bank Annuities so transferred to and standing in the names of the said [*trustees*], as aforesaid, have been so transferred to and are now standing in their names, UPON TRUST that they the said [*trustees*], and the survivor of them, and the executors, and administrators of such survivor, do and shall stand and be possessed of and interested in the same, upon the trusts following, (that is to say), *Upon trust*, in the first place, to permit and suffer the said [*first tenant for life*] and his assigns, yearly and every year during the term of his natural life, to have and receive and take the interest, dividends, and annual produce thereof, as the same shall accrue due; and from and after the decease of the said [*first tenant*

Right to convey;

Quiet enjoyment;

—free from incumbrances;

—further assurance.

Declaration that trustees shall be possessed of stock,

Upon trust to pay dividends to first tenant for life, during his life, and after his decease, to persons entitled to the land under the will;

57. FREEHOLDS, INDEMNITY AGAINST CONTINGENT ESTATES TAIL.

for life], *Then in trust*, to permit and suffer the person or persons who, for the time being, by virtue of the above-recited limitations in the said will of the said [*testator*], deceased, would have been entitled to the rents and profits of the said hereditaments and premises, in case these presents had not been made, to receive and take the said dividends, interest, and annual proceeds; *And upon this further trust*, that in case there shall happen to be any son or sons of the body of the said [*first tenant for life*], or of the body of the said [*wife*], or any issue male of any such son or sons, who shall happen to live to attain the age of twenty-one years, and, being, under the will of the said [*testator*], deceased, entitled to the first remainder in tail therein limited, shall, at his own proper costs and charges, by such assurances or acts in the law as counsel shall advise, release, convey, and assure unto and to the use of the said [*purchaser*], his appointees, heirs, and assigns, or otherwise as he or they shall direct, all and singular the same hereditaments and premises, and all his estate, right, title, and interest therein, so and in such manner as that an absolute and indefeasible estate of inheritance in fee-simple of and in the same hereditaments and premises may be vested in the said [*purchaser*], his appointees, heirs, or assigns, or otherwise as he or they shall direct, and the estate and title of the said [*purchaser*], his heirs, appointees, and assigns therein, may be effectually established, quieted, and confirmed; *Then* and in such case they the said [*trustees*], or the survivor of them, shall, subject and without prejudice to the interest of the said [*first tenant for life*] and [*wife*] in the yearly interest thereof for their respective lives, as aforesaid, stand and be possessed of and interested in the said £—— Consolidated Bank Annuities, and the interest, dividends, and proceeds thereof, upon trust for, and shall pay or transfer the said sum of £—— Consolidated Bank Annuities, or the produce thereof, or the funds wherein the same shall be invested, unto such son, or his issue male, as, being entitled to the said hereditaments and premises by virtue of and under the said limitations contained in the said will of the said [*testator*], deceased, shall make such assurance as aforesaid; *And upon this further trust*, that, in case the said [*purchaser*], his appointees, heirs, or assigns, or any person or persons whosoever, claiming, or who shall or may claim, any estate, right, title, or interest of, in, or to the said hereditaments and premises, by, from, or under him, shall, at any time hereafter, be evicted from, or dis-

and if tenant in tail shall convey the lands to the purchaser,

to transfer the stock to such tenant in tail;

but, in case purchaser is evicted, to transfer the stock to him.

57. FREEHOLDS, INDEMNITY AGAINST CONTINGENT ESTATES TAIL.

possessed of, or prevented or interrupted in, the quiet and peaceable enjoyment and receipt of the rent and profits of the said hereditaments and premises, by any such son, either of the said [*first tenant for life*], or the said [*wife*], or by the issue male of any such son respectively, or by any person or persons claiming by, from, or under, or through such son or issue, and not by, from, under, or through, the said [*purchaser*], his appointees, heirs, or assigns, Then in trust that they the said [*trustees*], or the survivor of his executors or administrators, or their or his assigns, do and shall, immediately after such eviction or interruption, stand and be possessed of the said £—— Consolidated Bank Annuities, and the interest, dividends, and proceeds thereof, *In trust* for the said [*purchaser*], his executors, administrators, and assigns, and pay and transfer the same, or the funds whereon the same shall be invested, unto the said [*purchaser*], his executors, administrators, or assigns; and to, for, and upon no other use, trust, intent, or purpose whatsoever. PROVIDED ALWAYS, and it is hereby agreed and declared, that it shall be lawful for the said [*trustees*], or the survivor of them, his executors or administrators, or their or his assigns, with the consent in writing of the said [*first tenant for life*], [*wife*], and [*purchaser*], or of the survivors or survivor of them, and, after the decease of such survivor, at the discretion of the said trustees or trustee for the time being, at any time or times, to sell and dispose of the said £—— Consolidated Bank Annuities, or any part thereof, and with the like consent, or at such discretion as aforesaid, (as the case may be), to lay out, and convert the produce thereof, in the names or name of the trustees or trustee for the time being of these presents, upon or in any like or other government or parliamentary stocks or funds of Great Britain, or at interest upon real security in England, and not in Ireland; and so in like manner, from time to time, to change and vary the trust funds and securities, whereon the produce of the said trust premises shall for the time being happen to be invested: *And that* all the stocks, funds, and securities, whereon the same trust premises shall for the time being be invested, and the dividends, interest, and annual produce thereof, shall be held upon the trusts hereinbefore expressed and declared concerning the said £—— Consolidated Bank Annuities, and the dividends thereof respectively; *And further, that* the receipts or receipt of the trustees or trustee for the time being of these presents, shall

Power to vary securities.

Trustees' receipt to be sufficient discharges.

be a sufficient discharge or release for the monies from time to time to be called in, or to arise from the sale or other disposal of any such stocks, funds, or securities, as aforesaid, and shall exempt the person or persons paying the same from all responsibility in respect of the application thereof (*e*). PROVIDED ALSO, and it is hereby further agreed and declared, that each of the trustees for the time being of these presents, shall be charged with such sums only as he shall actually receive by virtue of the trusts herein contained, notwithstanding his joining in or signing any receipt or receipts, or doing any other act for the sake of conformity, and shall not be answerable for any involuntary loss which may happen in the execution of the aforesaid trusts, or in relation thereto; and may retain to himself, or allow to his co-trustee or co-trustees, out of the monies which shall come to his hands by virtue of the trusts aforesaid, all costs and expenses of or incident to the execution of the trusts aforesaid. IN WITNESS, &c.]

57. FREEHOLDS, INDEMNITY AGAINST CONTINGENT ESTATES TAIL.

Indemnity to trustees.

(*e*) [A power to appoint new trustees may be added, but the trusts are not of such a nature as to render this of much importance.]

58. RELEASE *by three of four* CO-HEIRS (*the other being an Infant*) *of their Shares.* COVENANT *that the* INFANT CO-HEIR *shall convey his Share* (*a*) *when of age, the* HUSBANDS *of two of them joining and* COVENANTING *for the Title.* (*Variations where Purchaser retains the Infant Co-heir's Share of the Purchase-Money, and covenants to pay it to him on his executing a Conveyance of his Share; and where the Infant is made a Party to the Deed.*)

58. BY THREE OF FOUR CO-HEIRS, THE OTHER BEING AN INFANT.

THIS INDENTURE, made the —— day of ——, BETWEEN [*first vendor*], of &c., and [C. D.], his wife, one of

Parties.

(*a*) Sometimes, when an infant's share in an estate is sold together with others, it is included in the deed of conveyance, and he is made a conveying party in respect of that share, and executes the deed when he comes of age, the time of his execution being noticed in the memoran-

As to including infant's share in the conveyance.

58. BY THREE OF FOUR CO-HEIRS, THE OTHER BEING AN INFANT.

the two surviving sisters of [A. B.], late of ——, deceased (*b*), [*second vendor*], of &c., and [E. F.], his wife, the other surviving sister of the said [A. B.]; [*third vendor*], of &c., eldest son and heir of [G. H.], late of ——, deceased, one of the sisters of the said [A. B.] (*c*); which [C. D.], [E. F.], and [*third vendor*], together with [*infant*], (an infant under the age of twenty-one years, viz. of the age of twenty years, or thereabouts, the eldest son and heir-at-law of [I. K.], late of ——, one of the sisters of the said [A. B.]), are the co-heirs of the said [A. B.] deceased, of the first part; [*purchaser*], of &c., of the second part; and [*trustee*], of &c., of the third part.

Recital of conveyance by lease and release and fine to late owner.

WHEREAS, by indentures of lease and release, the latter bearing date the —— day of ——, and made between [R. S.] and [*wife*], his wife, of the one part, and the said [A. B.] of the other part, and by a fine sur cognizance de droit come ceo, &c., levied in or as of —— term, in the year ——, by the said [R. S.] and [*wife*], his wife, in pursuance thereof, All and singular the —— and hereditaments hereinafter mentioned (*d*), *three undivided fourth parts whereof are hereby released*, or intended so to be, were conveyed and assured unto and to the use of the said [A. B.], his heirs and assigns for ever.

Recital of will;

AND WHEREAS the said [A. B.] has since departed this life, having duly made and published his last will and testament in writing, bearing date on or about the —— day of ——, whereby he ordered that all his just debts should be paid, and with the payment thereof did charge all his estate; And, subject thereto, the said [*testator*] gave, devised, and bequeathed All his lands, tenements, and hereditaments, goods, chattels, real and personal estate, of what

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dum of attestation. This avoids the expense of an additional conveyance. [When the infant is thus made a party, there is a little want of technical propriety in making the adult vendors covenant that he shall execute the deed; but this formal inaccuracy is amply excused by the saving which it effects.]

As to recitals in the descriptions of the parties.

(*b*) [A little saving in length may sometimes be effected by stating facts of this kind in the description of the parties; but these recitals out of place render the instrument less intelligible on a first perusal, and the use of them is not to be recommended. The very common practice of using them *in addition* to the regular recitals of the same facts, is quite indefensible.]

(*c*) "And [*infant*], of &c., (an infant under, &c.), which [C. D.] [E. F.] [*third vendor*], and [*infant*], are the co-heirs," &c.

(*d*) [If the infant is made a party, omit the words in italics throughout.]

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nature or kind soever, and wheresoever, unto his said wife, [F. B.], his heirs, executors, administrators, and assigns, to her and their own use and benefit absolutely for ever. AND WHEREAS the said [F. B.], the wife of the said [A. B.], died in his lifetime (*e*), and upon the decease of the said [A. B.], the inheritance in fee-simple of the said premises, (charged with the payment of his said debts), descended to and became vested in the said [C. D.], [E. F.], [*third vendor*], and [*infant*], as co-heirs at law of the said [A. B.]. AND WHEREAS, for the purpose of raising a fund to discharge the debts owing by the said [A. B.], the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], have contracted with the said [*purchaser*] for the absolute sale of the inheritance in fee-simple in possession of the said premises, at or for the price or sum of —— (*f*). And, inasmuch as the sale of the undivided fourth part vested in the said [*infant*] of and in the said premises cannot (*g*) be *now* perfected by reason of his infancy, the said [*first vendor*], [*second vendor*], and [*third vendor*], have undertaken that the said [*infant*], within the space of one calendar month next after that he shall have attained his age of twenty-one years (*h*), *or his heir in case of his death in the meantime*, within one calendar month next after such decease, or if such heir shall be under any disability, then within one calendar month after the removal of such disability, will and shall convey and assure the same fourth part to such uses as are hereinafter expressed (*i*). NOW THIS INDEN-

—that late owner and his wife are dead, and that premises vested in co-heirs;

—contract for sale;

—for the conveyance by the infant of the other undivided fourth share.

Testatum.

(*e*) In this case the will is recited, in order to show the charge for payment of debts; otherwise it would have been sufficient to state that the late owner had died intestate as to the said hereditaments, a devise in fee-simple thereof contained in his will having lapsed by the death of the devisee in his lifetime.

(*f*) It is not essential to state, that the object of the sale was to pay the debts. It is enough that the contrary does not appear, and then it will be presumed that the sale was made for this purpose. Whether the statement be made or not, the purchaser is not obliged to see to the application of his money. Vide ante, Vol. 5, p. 141, and Vol. 8.

(*g*) "at the date of these presents,"

(*h*) "duly execute these presents, or that, in case of his death in the meantime his heir within," &c., (*ut supra*).

(*i*) If any portion of the purchase-money is retained by the purchaser, add—

"and have agreed that in the meantime the sum of £——, Also, where

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TURE WITNESSETH, that, in pursuance of the hereinbefore recited contract, and in consideration of the sum of £—— sterling, paid by the said [*purchaser*] to the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], at and before the execution of these presents, the receipt of which sum of £—— (*k*), being the full consideration for the absolute purchase of the inheritance in fee-simple of the entirety of the said several premises so contracted to be sold as aforesaid, the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*] (*l*), do hereby acknowledge, and from the same respectively do acquit, release, and discharge the said [*purchaser*], his heirs, executors, and administrators, the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, *and* [*third vendor*] (*l*), *Do, and every of them Doth,* by these presents, (made, &c., *ut ante, p.* 72), grant, bargain, sell, and release unto the said [*purchaser*], and his heirs, [ALL THOSE three undivided fourth parts or shares of the said [*first vendor*] and [C. D.], his wife, in her right, [*second vendor*] and [E. F.] his wife, in her right, and [*third vendor*], respectively, of and in] (*m*), ALL THAT (*parcels and general words*), And [also of and in] (*m*) the reversion and reversions, remainder and remainders, rents and profits of all and singular the said premises. *And* all the estate, right, title, interest, trust, claim, and demand whatsoever, either at law or in equity, of them the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, *and* [*third vendor*] (*l*) respectively, in and to the said premises and every part thereof. And all deeds, evidences, and writings relating to the said premises, which they the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, *and* [*third vendor*] (*l*), or any of them, have or hath in

In consideration of purchase-money, grantors convey their respective shares.

Reference to lease for a year.

Premises.

And all the estate, &c.

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part of the said purchase-money, shall be retained by the said [*purchaser*] at interest, after the rate of 5*l.* for 100*l.* by the year."

infant's share of purchase-money is retained by the purchaser.

(*k*) If part of the purchase-money is retained, say—
" making, together with the said sum of £——, agreed to be retained by the said [*purchaser*] as aforesaid, the said purchase-money or sum of £——."

(*l*) "and [*infant*],"

(*m*) [If the infant is a party, omit the words within crotchets.]

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the custody or power of them or any of them. TO HAVE AND TO HOLD the said *three undivided fourth parts or shares of and in the said* hereditaments, and all other the premises mentioned to be hereby released, with their and every of their appurtenances, unto the said [*purchaser*] and his heirs, to the uses following, that is to say, (*uses to prevent dower, ut ante, p.* 73.) AND the said [*first vendor*], for himself, his heirs, executors, and administrators, and for the estate, title, possession, and further assurance of one undivided fourth part only of the said hereditaments and premises, and as to, for, and concerning the acts, deeds, and defaults of himself and the said [C. D.], his wife, and the said [A. B.], deceased, and all persons claiming through or under them respectively only; and the said [*second vendor*], for himself, his heirs, executors, and administrators, and for the estate, title, possession, and further assurance of one other undivided fourth part only of the said hereditaments and premises, and as to, for, and concerning the acts, deeds, and defaults of himself and the said [E. F.], his wife, and the said [A. B.], deceased, and all persons claiming through or under them respectively only; and the said [*third vendor*], for himself, his heirs, executors, and administrators, and for the estate, title, possession, and further assurance, of one undivided fourth part only of the said hereditaments and premises, and as to, for, and concerning the acts, deeds, and defaults of himself and the said [A. B.], deceased, and all persons claiming through or under them respectively only (*n*), DO severally covenant with the said [*purchaser*], and his heirs, by these presents, in manner following, (that is to say), That they the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, (*o*) *and* [*third vendor*] (*p*), some or one of them, are or is now seised of (*o*) *three undivided fourth parts of* (*q*) the said hereditaments

Habendum.

Uses.

Covenants for title by vendors, according to the respective shares of themselves and their wives;

—that the grantors are seised in fee;

(*n*) "and the said [*infant*], for himself, his heirs, executors, and administrators, and for the estate, title, possession, and further assurance of one undivided fourth part only of the said hereditaments and premises, and as to, for, and concerning the acts, deeds, and defaults of himself and the said [A. B.], deceased, and all persons claiming through or under them respectively only;"

(*o*) [If the infant is a party, omit the words in italics.]

(*p*) "and [*infant*],"

(*q*) A few alterations in the precedent in the text have been made, Remarks upon

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and premises mentioned to be hereby released, for an absolute and indefeasible estate of inheritance in fee-simple

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the precedent in the text.

which should be noticed. The covenants for title extended to the *entirety;* but, as the covenant for the future conveyance of the infant's share provides (as it will be seen) that he (the infant) shall enter into the usual covenants for title, it was deemed more proper to restrict the covenants in the text to the undivided shares of the present grantors and covenantors.

Sometimes, indeed, where an undivided share is outstanding in an infant, whose conveyance the vendors bind themselves to obtain, it may be prudent, if the vendors have received the whole purchase-money, and they stand in the relation of heirs presumptive to the infant, to make their conveyance, as well as their covenants for title, extend to the entirety, in order that if the land should afterwards descend to them by the death of the infant, the shares so subsequently acquired may be bound by estoppel. It was formerly thought that estoppel was confined to assurances by record and demises and feoffments by indenture; but subsequent cases seem to countenance the notion that all the effect which belongs to a fine or demise may be derived from any other assurance, if made by indenture. Vide ante, Vol. 4, p. 124. But see contrà *Lloyd* v. *Lloyd*, 2 Con. & Laws. 598.

Estoppel extends to all assurances by indenture.

Whether an indenture can operate by estoppel, when it discloses that the grantor had no interest.

It is to be remembered, however, that, according to the doctrine of the case of *Hermitage* v. *Tomkins*, 1 Lord Raym. 729, it is essential to the operation of an indenture by estoppel, that it should not appear upon the face of the indenture, that the grantor had no interest, and, therefore, it would be advisable not to introduce into the deed of conveyance any recital explanatory of the state of the title; and this distinction, growing out of the application of the doctrine of estoppel, is quite consistent with the principle on which that doctrine rests, and which may be described to be, that where a man makes a solemn assurance of an estate, involving, of course, unless contradicted by the context, an assertion of title to such estate, the law will not allow him, or any person claiming under him, to aver, in contravention of his own grant, that the land, which was the subject of the conveyance, did not then belong to him. The ground for this evidently is, the inconsistency between the grant of the party and his subsequent allegation, that he had no title at the time; but which inconsistency seems not to exist, if the indenture itself discloses that the grantor had no estate, for the recital may be considered as controlling the granting part of the instrument. But, perhaps, the case of *Doe* d. *Christmas* v. *Oliver*, 10 B. & Cr. 181, may be thought to throw a doubt upon this doctrine, since no attempt was made to negative the operation of a fine as an estoppel, on the ground of the want of title of the conusor being apparent on the face of the deed declaring the uses, as it is evident was the fact, since the conusor was described in the statement of parties to the deed as devisee named in the will under which he claimed; and a deed and fine being considered as one assurance, there seems to be no solid distinction between this case and that under discussion; but, as the point was not brought to the attention of the Court, it is not safe to disregard the doctrine of *Hermitage* v. *Tomkins*, either as applicable to fines or indentures. [That doctrine is perfectly well settled, and has since been fre-

in possession: And also, that they the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, *and* [*third*

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quently recognised, notwithstanding the oversight in *Doe* v. *Oliver*. Vide ante, Vol. 4, p. 123; *Doe* d. *Baker* v. *Goldsmith*, 2 Cr. & J. 674.]

As to estoppel, where an interest passes.

[It is sometimes laid down that there is no estoppel when an interest passes. (See 2 Smith's Lead. Cas. 457). This is by no means universally true; and was, perhaps, originally intended to express merely the rule just discussed, that the real interest of the party to be estopped must not appear on the instrument,—a disclosure which can scarcely happen, except where there is some interest to be passed. It is clear, however, that if the limited nature of the interest is not disclosed, a party who professes to convey more than he has, will be estopped from denying the full effect of his grant as much when he has some interest as when he has none. This is the well-known rule with respect to a fine, (See *The case of Fines*, 3 Rep. 849, *Helps* v. *Hereford*, 2 B. & Al. 242, Shepp. Touchst. 6), and must equally extend to estoppels by deed. The apparent exception in the case of a *demise* by a person having a partial interest (ante, Vol. 4, p. 122), depends upon the peculiar interpretation which the Courts have put upon the contract of tenure.]

Operation of a fine by a contingent remainder-man.

It may be observed, in regard to fines levied by a contingent remainder-man, that it has been decided, not only that the fine does not destroy the contingent remainder, *Doe* d. *Brune* v. *Martyn*, 8 B. & C. 497, 2 M. & R. 485, and has an incipient operation by estoppel, but that, when the contingency happens, it operates upon the estate *precisely in the same manner as though that estate had been vested in the conusor at the time the fine was levied*;* and, it seems, according to the case of *Bensley* v. *Burdon*, 2 Sim. & St. 519, that the same effect would flow from a conveyance by indentures of lease and release. This goes far to overturn the position strenuously maintained by some writers, that a contingent remainder is not capable of being the subject of alienation, or at least substitutes for that position the much narrower doctrine, that such an interest is not alienable, except by assurance by record or by *indenture*.

Conveyance by contingent remainder-man made good out of estate acquired after the destruction of the remainder. *Noel* v. *Bewley*.

It may further be observed, that, where a contingent remainder-man sells and aliens his interest, and the remainder (not being protected by the usual limitation to trustees) is subsequently destroyed by the act of the tenant for life, and the vendor afterwards obtains an interest in the estate thus tortiously acquired, he will be bound in equity to make good his conveyance out of the latter interest, so far as it will extend. This point was decided in the case of *Noel* v. *Bewley*, 3 Sim. 83, the facts of which were as follow:—In 1711, a mortgage for a term of years was made to A.; and in 1712, a mortgage in fee was made of the same estate to S. in trust for A. In 1714, the equity of redemption was con-

* [This important doctrine appears to be settled by the case of *Doe* v. *Oliver*. Vide ante, Vol. 4, p. 122. Upon the question of extinguishment, which, it is now settled, depends upon the intention to be collected from the deed declaring the uses of the fine, see also Gouldsb. 162; Cro. Car. 484: *Davies* v. *Bush*, M'Clel. & You. 58. As to a lease by estoppel, see Bac. Ab. *Leases* (O); *Trevivan* v. *Lawrence*, 1 Salk. 276; 6 Mod. 258: and Hale's note, Harg. & Butl. Co. Litt. 476.]

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vendor] (*r*), some or one of them, for or notwithstanding any such act, matter, or thing as aforesaid, now have or hath in him-

Noel v. *Bewley*.

veyed to A., and the mortgage term assigned to a trustee for him, to attend the inheritance; and S. covenanted that he would stand seised in trust for A., but no reconveyance was ever executed by him. In 1782, A. devised his real estate to his daughter B., for life, with remainder to such of her children by H. as should be living at her death. In 1802, C., the only child of B. by H., *in her lifetime*, granted his contingent remainder to his bankers in trust to secure advances made and to be made to him, and covenanted for further assurance in the usual manner. In 1817, B. executed a conveyance in trust for herself, by which the contingent remainder, depending on her life estate, (unless it could be considered as an equitable limitation by reason of the legal estate outstanding in the representatives of S.), was destroyed; and immediately afterwards by will devised the property in question, in trust to pay debts and funeral expenses, and subject thereto in trust to pay two-thirds of the yearly produce to her son C., for life. After the death of B., the bankers filed a bill against C. and the trustees of the will of B., charging, that the contingent remainder created by the will of A. was not destroyed by the act of B., inasmuch as the legal inheritance was outstanding in the representatives of S.; but, if such destruction had taken place, claiming to be declared entitled to whatever interest C. took under the will of his mother B.: the Vice-Chancellor (Sir L. Shadwell) held, that a reconveyance might be presumed of the legal estate vested in S., (vide ante, Vol. 6, p. 450); which presumption was aided by certain acts of dominion performed by A. in granting leases, &c.; and that, therefore, the contingent remainder was destroyed by the conveyance of B., the tenant for life. He held, however, that the plaintiffs were entitled to the benefit of the interest taken by C. under his mother's will. On this point his Honor observed—"It strikes me, that any interest which C. might acquire in the estate which he professed to convey by the deed of 1802, would be operated upon by the covenant for further assurance in that deed; and, therefore, inasmuch as the contingent remainder was destroyed, and in lieu of it he received a different interest in the land, he is bound, in equity, to make good his covenant. But I do not place much reliance upon the covenant for further assurance, because I take the law to be this, that, *if a person has conveyed a defective title, and he afterwards acquires a good title, this Court will make that good title available to make the conveyance effective*. The distinction between the cases cited and the present case appears to be this—that, in the former, the parties who made a conveyance for a valuable consideration, had a defective title, and were supposed to have a good one, and that that title, originally defective, was, either wholly or partly, made good by some subsequent circumstances. But, in the present case, C. actually had the title that he professed to have, and conveyed what he had and professed to have, namely, a contingent remainder. But, then, it turns out, that, by the

(*r*) "and [*infant*],"

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self, herself, or themselves, good right, full power, and lawful and absolute authority, by these presents, to release or assure the said *three undivided fourth parts, mentioned to be hereby released as aforesaid, of the said* hereditaments and premises, unto the said [*purchaser*], his heirs and assigns, to the several uses, and in the manner aforesaid, according to the true intent and meaning of these presents; *And further*, that all and singular the said *three undivided fourth parts of and in the said* hereditaments and premises mentioned to be hereby released as aforesaid, shall and lawfully may, from time to time, and at all times for ever hereafter, remain, continue, and be to the several uses hereinbefore expressed concerning the same, and shall and may accordingly be peaceably and quietly held and enjoyed, without any interruption or denial by them the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, *and* [*third vendor*] (*s*), or by the heirs of the said [C. D.], [E. F.], *and* [*third vendor*] (*s*), respectively, or by any other person or persons lawfully claiming any estate, right, title, trust, or interest, of, in, or to the same, by, from, or under them or any of them, or by, from, or under the said [A. B.], deceased, or by means of the acts, default, privity, consent, or procurement of them, or of any of them: And that free and clear, and freely and clearly acquitted, exonerated, and discharged of and from all and all manner of former and other estates, rights, titles, charges, and incumbrances whatsoever, made, done, occasioned, or suffered by them the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, *and* [*third vendor*] (*s*), or any of them, or by the said [A. B.], deceased, or by or through the acts, defaults, privity, consent, or procurement of them or any of them; *And more-*

—have a right to convey.

—for peaceable possession;

free from incumbrances;

—for further assurance.

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act of his mother, the contingent remainder was destroyed; and by her act he acquires an interest in the estate. I cannot, however, think that the circumstance of the party conveying what he really had can make any substantial difference as to the relief to be afforded in this Court to the grantee." If the defendant C. had taken a legal interest under the limitations in his mother's will, it should seem that the present suit would have been unnecessary, as the conveyance would have operated on that interest by way of estoppel. *Bensley* v. *Burdon*, 2 Sim. & Stu. 519. [On the appeal in that case Lord Lyndhurst expressed an opinion, that a purchaser, with a covenant for further assurance, was not bound to rely on a title by estoppel. 3 Law J., Ch., 85.]

(*s*) "and [*infant*]."

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over, that they the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, *and* [*third vendor*] (*t*), and the heirs of the said [C. D.], [E. F.], *and* [*third vendor*] (*t*), respectively, and all and every other person or persons lawfully claiming any estate, right, title, trust, or interest, of, in, to, or out of the said *three undivided fourth parts or shares hereinbefore mentioned to be hereby released, of and in the said* hereditaments and premises, by, from, or under them or any of them, or by, from, or under the said [A. B.], deceased, will and shall, from time to time and at all times hereafter, at the reasonable request, and at the costs and charges of the said [*purchaser*], his appointees, heirs or assigns, make, do, and execute, or cause to be made, done, and executed, every such further act, deed, conveyance, and assurance whatsoever, for the more effectually conveying and assuring the said *three undivided fourth parts or shares hereinbefore mentioned to be hereby released of and in the said* hereditaments and premises, with their and every of their appurtenances, unto the said [*purchaser*], his appointees, heirs, and assigns, to the several uses hereinbefore expressed concerning the same, as by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel in the law, shall be advised and required, [so as, &c., *ut ante*, *p.* 77].

Covenant that the infant shall convey when of age.

And lastly, the said [*first vendor*], [*second vendor*], and [*third vendor*], for themselves and their respective heirs, executors, and administrators, do hereby jointly and severally covenant with the said [*purchaser*], his heirs and assigns, That the said [*infant*], within one calendar month next after that he shall have attained his age of twenty-one years (*u*), *or, in case of his death in the meantime, then* the heir of the said [*infant*], within one calendar month next after such his decease, or, if such heir shall be under any disability, within one calendar month next after the removal of such disability, and also any person or persons claiming through or under the said [*infant*] or his heir (*x*), shall, at the request, costs, and charges of

(*t*) "and [*infant*]."

(*u*) "shall duly sign, seal, deliver, execute, and perfect these presents, or, in case of his death without having so done, then that"

(*x*) This would extend to any wife of the infant or heir, who might be dowable.

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him the said [*purchaser*], his appointees, heirs, or assigns, by such conveyances and assurances in the law as the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel learned in the law shall advise and require, effectually convey and assure All that one undivided fourth part or share now vested in him the said [*infant*], of and in all and singular the said hereditaments and premises, unto the said [*purchaser*], his heirs and assigns, To the several uses hereinbefore limited or expressed, or such of them as shall be then subsisting and capable of taking effect, free from all incumbrances whatsoever, made, done, committed, or suffered by him the said [*infant*], or any person or persons claiming through or under him, And enter into such covenants for the estate, title, possession, freedom from incumbrances, and further assurance thereof, as in the like cases are usual; And that in the meantime it shall be lawful for the person or persons for the time being entitled under the uses hereinbefore declared and contained, peaceably and quietly to hold and enjoy the said undivided fourth part or share of the said hereditaments and premises, without any interruption or disturbance of or by the said [*infant*], or any person or persons lawfully claiming through or under him (*y*). IN WITNESS (*z*), &c.

(*y*) If any part of the purchase-money is retained by the purchaser, add :—

Covenant by purchaser to pay infant his share of purchase-money on his conveying.

"*And* the said [*purchaser*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*first vendor*], [*second vendor*], and [*third vendor*], and every of them, their respective executors and administrators, that he the said [*purchaser*], his heirs, executors, or administrators, will or shall, on the perfecting such conveyance of the said undivided fourth part or share of the said [*infant*] of or in the said hereditaments and premises, as aforesaid, pay unto the said [*infant*], or his heirs, the sum of £——, agreed and intended to be retained by him the said [*purchaser*], out of the said entire purchase-money or sum of £——, together with interest for the same after the rate aforesaid, in full satisfaction and discharge of his said purchase-money."

(*z*) If the deed is executed by any one of the parties by attorney, add to the testimonium as follows :—

"As to the said [A. B.], by [C. D.], his attorney lawfully

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authorised in that behalf by a certain power of attorney hereunto annexed, or hereupon indorsed.

(L. S.) [A. B.] by [C. D.], his attorney."

Delivery and attestation on execution by attorney.

The delivery should be—

"I deliver this as the act and deed of the above-named [A. B.]"

The attestation may be thus—

"Signed, sealed, and delivered by [C. D.], as the attorney, in the name, and as the act and deed, of the within-named [A. B.], in the presence of

[*Witnesses.*]"

(*See other Forms, ante, pp.* 172, 203).

59. OF COPYHOLDS UNDER A POWER IN A WILL.

59. BARGAIN *and* SALE *of* COPYHOLD LAND *by the* TESTAMENTARY DONEES *of a* POWER (*a*), *the Persons interested in the Purchase-Money covenanting for the Title.*

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendors*], of &c., of the first part: [*five cestuis que*

Parties.

As to the best mode of a testator's creating a power or trust for the sale of copyholds.

(*a*) Where it is intended that copyhold estates shall be sold by trustees immediately on the testator's decease, it is advisable not to devise the property to them, but merely to create an authority to sell, in order to avoid the necessity and consequent expense of the trustees being admitted; as donees of the power of sale of course they are not entitled, nor can they be compelled, to be admitted; the trustees have only a power of nominating on a sale the persons who are entitled to claim admittance from the lord, (and on payment of a single fine), and to whose benefit the surrender to the use of the will, when such surrender was necessary to its validity, enured. *Holder* d. *Sulyard* v. *Preston*, 2 Wils. 400. The same effect now arises from the will alone. But the expedient for avoiding the necessity of the admittance of the trustees can only be adopted when the sale is to take place immediately on the testator's decease; for the lord would be entitled to require that the vacancy in the tenancy occasioned by the death of the late copyholder, should be supplied by the admittance of the person to whom the property had devolved, and in case of default, after proclamations in the usual manner, might seize quousque. The sale, therefore, should be made in sufficient time to prevent this; otherwise the heir must be admitted in order to save the property from the lord's seizure. If the copyhold is devised for

trust], of &c., of the second part; and [*purchaser*], of &c., of the third part. WHEREAS the commissioners named in

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Recital of the

life; and is to be sold on the determination of that estate, of course it is impossible to prevent the necessity of the devisee for life being admitted; but even then it may be worth while to give the trustees a power of sale only instead of (or in addition to) an estate, if the fine on admittance is considerable, in order to avoid the fine in regard to the remainder in fee. [This precaution is only available where by the custom the fine is apportioned, and a part only is payable upon the admittance of the tenant for life. The admittance of the remainderman is frequently taken, upon payment of a fine, at the same time with the admittance of the tenant for life. See *Richardson* v. *Kensit*, 6 Scott, N. R., 419. Generally, the admittance of the particular tenant is the admittance of the remainderman or reversioner, and no fine is due in respect of the remainder. But, by special custom, in some places, although the remainderman is not required to be admitted, a fine is due on the death of the particular tenant; in others the admittance of the remainderman is requisite, either at the time of the admittance of the tenant for life, or subsequently; and in all these cases either a full fine is paid on the admittance of the particular tenant, and then none is due in respect of the remainder, or the fine is apportioned, part being paid on the admittance of the particular tenant and part on that of the remainderman. *Barnes* v. *Corke*, 3 Lev. 308, 4 Rep. 22: *Blackburne* v. *Graves*, 2 Lev. 107, 1 Mod. 120: *Doe* d. *Whitbread* v. *Jenney*, 5 East, 522: *Kensington* v. *Mansell*, 3 Ves. 240: *Dean of Ely* v. *Caldecott*, 1 Moo. & Sc. 633: *Phypers* v. *Eburn*, 3 Scott, 634: *Doe* d. *Winder* v. *Lawes*, 2 Nev. & P. 195, 7 Ad. & E. 195. See further, as to the principle on which fines upon admittances are assessed, *Wilson* v. *Hoare*, 2 Per. & D. 659, 10 Ad. & E. 236: *Reg.* v. *Dullingham*, 1 Per. & D. 172, 8 Ad. & E. 858: *Shepherd* v. *Woodford*, 5 Mee. & W. 608.]

As to the lord's right to seize in default of the heir coming in to be admitted.

The following points have been decided as to the proceedings of the lord of a manor, on the default of the heir of his tenant coming in to be admitted:—*First*, that the lord may avail himself of the right to seize, which had accrued to the preceding lord, under whose will he claimed. *Secondly*, that there must be three proclamations, on the death of a copyholder, for the heir to come in to be admitted, before the lord can seize; which proclamations should be made at three *consecutive* courts, there being no distinction in this respect between a seizure for a forfeiture and a seizure quousque; and, therefore, there having been a lapse of several courts between the second and third proclamations, the precept and seizure thereon could not be supported. *Doe* d. *Bover* v. *Trueman*, 1 B. & Ad. 736.

As to sales of freeholds under a common-law authority.

The precedent in the text is also adapted to the case of freeholds being sold under a common-law authority in a will, though such authorities are, at the present day, not often created of freehold lands, as the reasons which recommend their adoption in regard to copyholds do not apply to freeholds. The conveyancer, in preparing a bargain and sale by the donees of such a power, will bear in mind the difference between the effect of such an instrument, and a bargain and sale which derives its effect from the Statute of Uses. The common-law bargain and sale

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and appointed by an act of Parliament passed in the —— year of the reign of King George the Third, intituled "An Act," &c., did, by their award in writing under their hands and seals, dated the —— day of ——, assign and allot unto [*testator*], of &c., (with other lands), (*Describe parcels, consisting of one acre and three roods of land*). And the said commissioners did by their said award, in pursuance of a power in that behalf contained in the hereinbefore mentioned act, determine that the allotment made to the said [*testator*] should be copyhold of the manor of ——, in the aforesaid county of ——, the same being allotted in lieu and in respect of two acres of land with a messuage thereon, which he then held by copy of court roll of the said manor, and of the rights of common appendant or appurtenant thereto. And whereas, at a court holden for the said manor, on the —— day of ——, in the year ——, the said [*testator*] was admitted, by virtue of the said award, to the said one acre and three roods of land, allotted to him as aforesaid; *To hold* the same for such estate and interest as he before the execution of the said award had in the said two acres of land with the said messuage thereon, in respect of which the said allotment was made. And whereas the said [*testator*], by a testamentary paper under his hand, dated the —— day of ——, appointed the above-named [*vendors*] executors and trustees thereof, and thereby desired and authorised them to sell and dispose of all his copyhold messuages, lands, and hereditaments whatsoever, either altogether or in parcels, and to give receipts for the purchase-money; and declared that such purchase-money should form part of his personal estate; and after disposing of part of his household furniture, linen, and plate, and providing, out of his personal estate an annuity for his wife, (who is since deceased), he disposed of the money arising from the sale of his copyhold estate, and the rents thereof until sold, and the residue of his personal estate, after payment of his just debts and funeral expenses, unto and equally between his children, the above-named [*five cestuis que trust*]. And whereas the said

award of commissioners under an inclosure act;

—testator's admission to inclosure allotment.

Recital of will creating power of sale;

raises a seisin, on which uses may be limited, and, therefore, the property may be conveyed to the ordinary limitations to prevent dower, including the power of appointment, which it is well known a statutory bargain and sale does not admit of, as the instrument does not raise a seisin, but only transfers a use. It is also to be observed, that a bargain and sale under a common-law authority does not require inrolment. [See 2 Hayes's Introd. to Conv., p. 80.]

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[*testator*], the father, died shortly after the date of the aforesaid testamentary writing, without having revoked or altered the same; and the said [*vendors*], in the month of —— following, proved the said testamentary paper in the Prerogative Court of the Archbishop of Canterbury. AND WHEREAS the said [*testator*], the father, continued seised as aforesaid of the said one acre and three roods of land from the time of his admission thereto until his decease, and it was provided by the hereinbefore-mentioned act of Parliament, that the lands which should be allotted by virtue thereof should be subject to the same wills as the messuages and lands in respect of which such allotments should be made would have been subject to or affected by in case the said act of Parliament had not been made (*b*). AND WHEREAS the said [*vendors*] have contracted with the said [*purchaser*] for the sale to him of the said one acre and three roods of land allotted to the said [*testator*], deceased, as aforesaid, and the inheritance in fee-simple thereof in possession free from all incumbrances, at the price of £——. NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £——, of lawful British money, paid by the said [*purchaser*] to the said [*vendors*], at or before the sealing and delivery of these presents, by the direction of the other parties hereto, the receipt of which sum they the said [*vendors*] do hereby acknowledge, and therefrom do hereby acquit and discharge the said [*purchaser*], his heirs, executors, and administrators, they the said [*vendors*], in pursuance of the direction and authority contained in the hereinbefore-recited will of the said [*testator*] respecting the sale of his copyhold hereditaments, and of all other powers and authorities enabling them in this behalf, and with the approbation and by the direction of the parties hereto of the second part, Do by these presents bargain and sell unto the said [*purchaser*], his heirs and assigns, ALL THAT piece or parcel of land containing one acre and three roods, situate in the parish of ——, in the county of ——, so as aforesaid allotted and awarded to the said [*testator*], by the said commissioners for executing the hereinbefore-recited inclosure

—death of testator;

—contract for sale.

Testatum.

In consideration of purchase-money, vendors, in pursuance of the testamentary direction, bargain and sell to the purchaser.

Parcels.

(*b*) This recital is only applicable when the inclosure takes place in the interval between the making of the will and the testator's death, unless the testator died before the passing of the statute 55 Geo. 3, c. 192, in which case it would also apply where the inclosure intervened between the surrender to the use of the will and the testator's death.

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act, with the appurtenances, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof: AND all the estate, right, title, and interest, both at law and in equity, late of the said [*testator*], in and to the said hereditaments and premises, or any of them, or any part thereof. TO HAVE AND TO HOLD the said hereditaments and premises unto the said [*purchaser*], his heirs, and assigns for ever; TO THE USE of him the said [*purchaser*], his heirs and assigns for ever, at the will of the lord or lady and according to the custom of the aforesaid manor; and by and under the suits, services, rents, fines, and heriots therefore due and of right accustomed. (*Covenants by vendors that they have done no act to extinguish their power, or to encumber the premises, ut ante, p.* 249 (*c*)). AND the said

Habendum to the use of purchaser in fee.

As to inserting a power of appointment.

(*c*) In the present instance, a power of appointment is not reserved to the surrenderee, (pursuant to a suggestion, ante, p. 186), because, as the tenancy has become vacant by the decease of the testator, who was the tenant on the court-rolls, the necessity of the surrenderee's being admitted could not by such means be avoided. If the heir of the testator (whose admittance the lord might have compelled by seizure, if a sufficient time had elapsed since the testator's decease) had been admitted, of course this reason would not apply; the limitations introduced in the precedent above referred to would then be applicable, and the surrenderee might (as in ordinary cases) delay his admittance, and might, when he had occasion to alien the property, simply exercise his power of appointment.

Power to several executors, &c.

[The power under which the present bargain and sale is made is a power to declare such uses as the testator might himself have declared upon the supposed surrender to the use of his will. These uses are not governed by the same rules as uses of freehold lands, but are simply directions to the lord as to whom he shall admit, and for what estate, and there seems to be no objection in principle to the limitation of a power of appointment in an assurance of this nature.]

[A bare authority without an estate, given to several persons nominatim, cannot be exercised by the survivors or survivor, unless an intention to that effect is expressed. Co. Litt. 112. b. But it seems, that, when the power is given to several by a general description, as, "sons of A." &c., it may be exercised by two or more survivors, and, in the case of executors, donees of the power by that description, even by a sole survivor. But if the power is given to persons by name, who are appointed executors, it is doubtful whether the rule as to executors will apply. 1 Sugd. Pow. 144; Chance on Powers, 239; *Bonifaut* v. *Greenfield*, Cro. El. 80.]

[Where a bare authority was given to several executors, and one of them refused the office, the others were disabled at the common law to exercise the power. Co. Litt. 113. a. But the stat. 21 Hen. 8, c. 4, reciting that "divers persons before this time, *having other persons seised to their*

Stat. 21 Hen. 8, c. 4. Acting

[*four of the five cestuis que trust*], each one of them for himself or herself, and his or her heirs, executors, and administrators, and for and against his or her and their acts

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use, of and in lands and other hereditaments, to and for the declaration of their wills, have by their last wills and testaments willed and declared such these lands, &c. to be sold by their executors," and it hath happened that some of the executors have refused to act, and, after the opinion of divers persons, a bargain and sale by the others alone would not be effectual, enacts, "that, where part of the executors named in any *such* testament of any *such* person so making or declaring any such will of any lands, tenements, or other hereditaments, to be sold by his executors after the death of any such testator, do refuse to take upon them the administration and charge of the same testament and last will wherein they be so named executors, and the residue of the same executors do accept and take upon them the care and charge of the same testament and last will, that then all bargains and sales of such lands, tenements, and other hereditaments so willed to be sold by the executors of any such testator, as well heretofore made as hereafter to be made by him or them only of the said executors that so doth accept," &c., shall be as good and effectual as if all the executors named had joined.]

executors may exercise power of sale, though some of the executors named disclaim.

[Sect. 2, provides, "that this act shall not give authority to any executors to sell any lands, &c. by virtue of any will heretofore made, "otherwise than they might do by the course of the common law afore the making of this act."]

[This statute has been held to apply to powers coupled with an interest, assuming that the common-law rule did not render provision for that case unnecessary. (See *Bonifaut* v. *Greenfield*, Cro. El. 80; 1 Leon. 60; *Townson* v. *Tickell*, 3 B. & Al. 31; *Denne* v. *Judge*, 11 East, 288.]

[In modern times these naked powers have grown out of use with respect to freehold lands, being seldom resorted to except for the purpose of making an economical testamentary disposition of copyhold lands, and it is therefore important to ascertain whether the statute of disclaimer extends to powers over copyholds. There is no authority on this point, but there seems to be strong ground to contend that it does not. The enacting part of the statute is framed with reference to the preamble, and that in terms is confined to dispositions of the *use* of freehold lands, being the only means by which such lands could then be disposed of by will. The language of the second section seems also to shew that freehold lands alone were contemplated. It is clear, at any rate, that copyholds are not expressly named in the statute, and therefore, by the well-known rule, protecting the rights of lords of manors, (*Heydon's case*, 3 Rep. 7; Com. Dig., *Copyhold*, 4; *Doe* d. *Tunstill* v. *Bottriel*, 5 B. & Ad. 131), they must be excluded from its operation, if by including them any detriment could possibly accrue to the lord. Upon such a question a court of law would advert to all causes of advantage or loss to the lord, and must therefore see, in the jurisdiction of equity to supply the failure of such a power against the heir, an obvious source of benefit to the lord, by rendering necessary an admittance or surrender, which, if the statute were held to apply, would not be required.]

Whether copyholds are within the act.

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and deeds only, and so far as respects one undivided fifth part or share in the said hereditaments and premises hereby bargained and sold, or intended so to be, do hereby severally covenant, and the said [*husband of the other cestui que trust*], for himself, his heirs, executors, and administrators, and for the acts and deeds of the said [*wife*], his wife, so far as respects the remaining one undivided fifth part or share of the said hereditaments, doth hereby covenant with the said [*purchaser*] and his heirs in manner following, (that is to say), That, notwithstanding any act, deed, or thing by the said parties hereto of the second part, or any of them, or by the said [*testator*], the testator, deceased, made, done, committed, or knowingly suffered to the contrary, the said parties hereto of the first part now have in themselves good right, full power, and lawful and absolute authority to bargain and sell the said hereditaments and premises, to the use of the said [*purchaser*], his heirs and assigns for ever, in manner aforesaid, according to the true intent and meaning of these presents; *And also*, that it shall be lawful for the said [*purchaser*], his heirs and assigns, at all times hereafter peaceably and quietly to have, hold, and enjoy the said hereditaments and premises, and the rents, issues, and profits thereof to receive and take to his and their own use, without any lawful hindrance or interruption of, from, or by the said parties hereto of the second part, or any of them, or the heirs, executors, administrators, or assigns of any of them, or of, from, or by any other person or persons claiming by, from, or under the said [*testator*], the testator, deceased; *And that* free and clear of and from all former and other charges and incumbrances whatsoever, had, made, executed, occasioned, or suffered by the said parties hereto of the second part, or any of them, or by the said [*testator*], the testator, deceased, by or through the acts, default, privity, consent, or procurement of them or any of them; *And lastly*, that they the said parties hereto of the second part, and their respective heirs, and all other persons lawfully claiming any estate, right, or interest in or to the said hereditaments and premises, by, from, through, under, or in trust for them the said parties hereto of the second part, or any of them, or by, from, through, under, or in trust for the said [*testator*], the testator, deceased, will and shall at any time and from time to time hereafter, upon the reasonable request and at the costs and charges of the said [*purchaser*], his heirs or assigns, make, do, and execute, or cause and procure to be made,

Covenant by cestuis que trust,

—that the vendors have power to convey;

—for quiet enjoyment,

—free from incumbrances;

—for further assurance.

done, and executed, all such further and other lawful acts, deeds, conveyances, and assurances, for the more perfectly and absolutely conveying and assuring of the same hereditaments and premises with their appurtenances, to the use of the said [*purchaser*], his heirs and assigns for ever, in manner aforesaid, according to the true intent and meaning of these presents, as by the said [*purchaser*], his heirs or assigns, or his or their counsel in the law, shall be devised or advised and required. IN WITNESS &c.

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60. APPOINTMENT *and* RELEASE *by two Vendors, of their respective Moieties, to the* DEVISEES *of the deceased* PURCHASER, *the Consideration Money having been paid* (*a*), *and* PART *of the Estate conveyed to a* SUB-PURCHASER, *in the Purchaser's Lifetime. Recitals of* INCLOSURE, ALLOTMENT, *&c.*

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THIS INDENTURE, made &c., BETWEEN [*vendors*], of &c., of the first part; [*purchaser's widow*], of &c., of the second part; [*purchaser's daughter*], of &c., of the third part; [*purchaser's son*], of &c., of the fourth part; and [*dower trustee*], of &c., of the fifth part. WHEREAS, by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, the release being expressed to be made between [*commissioners*], of &c., commissioners named and appointed in and by an act of Parliament made and passed in the forty-ninth year of the reign

Parties.

Recital of conveyance to vendors;

(*a*) It is incumbent on an executor or administrator, before he pays for an estate which was purchased by his deceased testator or intestate, to ascertain that the title is such as a court of equity would have compelled the purchaser to accept; for, unless this is the case, his payment of the purchase-money out of the testator's or intestate's personal estate would be a misapplication of the assets. If the purchaser in his lifetime did any act which amounted to an acceptance of the title, this would preclude all inquiry into its sufficiency as between his representatives; but, as the payment of his purchase-money is not necessarily such an act, the executor would not be relieved from the necessity of satisfying himself of the validity of the title, by the fact that he was not called upon to pay for the estate, the purchase-money having been paid in the testator's lifetime; since, if the title were bad, it would be his duty to insist upon the contract being rescinded, and the purchase-money returned: the money so returned would go in augmentation of the personal estate.

Duty of an executor in regard to estates purchased by his testator.

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of King George the Third, intituled "An Act for inclosing lands in the parish of ——, in the county of ——," of the first part; and the said [*vendors*], of the third part; *All that* piece or parcel of land, (being part of an inclosure called ——), containing, by survey, eighteen acres, in the parish of —— aforesaid, and bounded &c., was conveyed and assured unto the said [A. B.] and his heirs; As to one moiety thereof, To the use of such person &c., (*uses to prevent dower in favour of first vendor, second vendor being his trustee*), And as to the remaining moiety or undivided half part thereof, To the use &c., (*like uses in favour of second vendor, first vendor being his trustee*).

—contract for sale;

And whereas the said [*vendors*] did, on or about the —— day of ——, in the year ——, contract and agree with [*testator*], of &c., aforesaid, for the absolute sale to him of the inheritance in fee-simple of the piece or parcel of land and hereditaments hereinbefore mentioned and comprised in the indentures of lease and release hereinbefore recited, at or for the price or sum of 1000*l.*; *And*

—payment of purchase-money;

the said [*testator*], shortly after the said contract was so entered into as aforesaid, paid the said purchase-money or sum of 1000*l.* to the said [*vendors*], as they do hereby respectively acknowledge, but no conveyance or other assurance of the said land and hereditaments, or any part thereof was made to the said [*testator*] in pursuance of the said contract.

—conveyance of part to a sub-purchaser.

And whereas, by indenture of release, bearing date the —— day of ——, and made between the said [*vendors*], of the first part; the said [*testator*], of the second part; [C. D.], of &c., of the third part; and [E. F.], of &c., of the fourth part; *All that* piece or parcel of freehold land lying and being in —— aforesaid, containing by admeasurement eight acres, three roods, twenty-four perches, (more or less), being part and parcel of the aforesaid eighteen acres of land, and of the inclosure called the ——, in —— aforesaid, conveyed and assured unto the said [*vendors*] by the hereinbefore-recited indentures of lease and release as aforesaid, and which eight acres, three roods, and twenty-four perches, were bounded &c., was, at the request and by the direction of the said [*testator*], and for a pecuniary consideration paid to him by the said [C. D.], duly appointed, conveyed, and assured by the said [*vendors*] unto or to uses for the benefit of the said [C. D.], his heirs, appointees, and assigns.

Recital of purchaser's will.

And whereas the said [*testator*], by his last will and testament in writing, bearing date the —— day of ——, gave, devised,

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and bequeathed all and singular his real estates, both freehold and copyhold, and all his personal estate and effects not thereinbefore specifically disposed of, and which he, or any person or persons in trust for him or for his use or benefit, was or were, or should or might, at the time of his decease, be seised or possessed of, interested in, or entitled unto, to his wife, the said [*widow*], and his son, the said [*son*], their heirs, executors, administrators, and assigns, respectively, *Upon trust* to pay unto or permit his said wife [*widow*], and her assigns, during her life(*b*), to receive and take the rents and issues, dividends, interest, and annual produce thereof respectively; and after her decease, *Then, as to* one undivided moiety of his said real and personal estate and effects, *Upon trust* for his daughter, the said [*daughter*], then the wife of [*husband*], her heirs, executors, administrators, and assigns, absolutely; and in the event of her death in his (the said testator's) lifetime, Then upon other trusts in his said will mentioned; *And as to* the other undivided moiety of his said real and personal estate and effects, *Upon trust* for his son, the said [*son*], his heirs, executors, administrators, and assigns, when and as he should attain the age of twenty-one years, and in case he should die under the age of twenty-one years, then upon other trusts in the said will mentioned; And the said [*testator*] appointed the said [*widow*] and [*son*] executrix and executor of his said will. AND WHEREAS the said [*testator*] departed this life in or about the month of ——, in the year ——, without having altered or revoked his said will, leaving the said [*widow*], his wife, and the said [*daughter*], then the wife of the said [*husband*], and the said [*son*], his children, him surviving; and the said will was afterwards duly proved by the said executrix and executor in the Prerogative Court of the Archbishop of Canterbury, AND WHEREAS the said [*daughter's husband*] died in or about the month of ——, in the year ——, and the said [*son*] attained the age of twenty-one years on or about the —— day of ——. AND WHEREAS the said [*widow*], and [*daughter*], and [*son*], have respectively now requested the said [*vendors*] to appoint, convey, and assure such part of the land and hereditaments so purchased by the said [*testator*] as aforesaid as was not sold by him in his lifetime, and

Death of testator.

Death of daughter's husband.

Application of devisees for conveyance.

(*b*) This would vest the legal estate, and not merely the beneficial interest, in the widow.

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conveyed to the said [C. D.] by the said indentures of lease and release of the —— and —— days of ——, to the uses and in manner hereinafter mentioned, which they respectively have agreed to do. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the said sum of 1000*l.* of lawful British money paid to the said [*vendors*] by the said [*testator*] in his lifetime, as is hereinbefore mentioned, the receipt of which sum of 1000*l.* they the said [*vendors*] do hereby respectively acknowledge, Each of them, the said [*vendors*], by virtue and in exercise of the power and authority to him given or reserved by the said indenture of release of the —— day of ——, and of every other power and authority in anywise enabling him in this behalf, DOTH [by this deed, sealed and delivered by him in the presence of, and to be attested by, the two credible persons whose names are intended to be hereupon indorsed as witnesses attesting his respective execution of these presents (*c*)] absolutely and irrevocably direct, limit, and appoint, That the one undivided moiety or equal half part, by the last-mentioned indenture of release limited and assured to uses for his benefit, of and in the piece or parcel of land and hereditaments hereinafter described and intended to be hereby released, with the appurtenances, shall, from henceforth, remain, continue, and be to the uses and upon and for the trusts, intents, and purposes hereinafter expressed and declared concerning the same. AND THIS INDENTURE ALSO WITNESSETH, that, in consideration of the premises, and also in consideration of the sum of 10*s.* to each of them the said [*vendors*] paid by the said [*releasee to uses*], immediately before the execution of these presents, the receipts whereof are hereby acknowledged, they the said [*vendors*], according to their several and respective estates and interests in the premises, but not further or otherwise, Do, and each of them DOTH, by these presents, made &c., (*ut ante, p.* 72), grant, bargain, sell, release, and confirm unto the said [*releasee to uses*] and his heirs. ALL THAT piece or parcel of land, containing by survey, nine acres, sixteen perches, being the remaining part of the said piece of land containing eighteen acres conveyed by the said commissioners to the said [*vendors*], as hereinbefore mentioned, and lying on the west side of the said piece of land, containing eight acres, three roods, twenty-

Testatum.

In consideration of purchase-money paid in purchaser's lifetime, the vendors respectively appoint;

to the uses after mentioned.

Further testatum.

Release by vendors.

Parcels.

(*c*) [The power required these formalities to be observed.]

60. TO DEVISEES OF DECEASED PURCHASER.

four perches, conveyed to the said [C. D.] as aforesaid, as the same is now in the occupation of [*tenant*], or his undertenants; *And* all [outhouses, edifices, buildings, feedings, timber, and other trees, hedges, ditches, fences, mounds, ways, paths, waters, watercourses, liberties, privileges,] hereditaments, easements, profits, commodities, advantages, and emoluments, whatsoever to the said piece or parcel of land and hereditaments respectively belonging, or in anywise appertaining, or reputed to belong or appertain, or held, occupied, or enjoyed with or as parcel or member of the same, or any of them respectively; [*And* (*d*) the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the said piece or parcel of land and hereditaments, with their and every of their rights, members, and appurtenances;] *And* all the estate, right, title, interest, use, trust, inheritance, property, possession, benefit, claim, and demand whatsoever, at law and in equity, or otherwise howsoever, of the said [*vendors*], respectively, of, in, to, from, or out of the same piece or parcel of land and hereditaments intended to be hereby conveyed, and every part and parcel of the same, with their and every of their rights, members, and appurtenances: To HAVE AND TO HOLD the said piece or parcel of land, and all and singular other the premises hereby released, or intended so to be, and every part and parcel of the same, with their appurtenances, unto the said [*releasee to uses*] and his heirs, To the uses, and upon and for the trusts, intents, and purposes hereinafter limited, expressed, and declared of and concerning the same. *And* it is hereby declared and agreed, That the directions, limitations, and appointments, and also the release hereinbefore contained, shall severally operate and enure To THE USE of the said [*widow*] and her assigns, for and during the term of her natural life; *And* from and immediately after her decease, then, As to one undivided moiety or equal half part of and in the said hereditaments and premises, To THE USE of the said [*daughter*], her heirs and assigns, for ever. And as to the other undivided moiety or equal half part of the said heredi-

General words.

And the reversion, &c.

And all the estate, &c.

Habendum.

Declaration of uses.

(*d*) Many practitioners invariably omit the reversion clause; and its insertion, if the lands are not in the occupation of a tenant, is rather incorrect; for, unless there is a particular estate, there can be no reversion or remainder; and even where there is a subsisting tenancy, the clause is unnecessary, and may be properly dispensed with.

As to the reversion clause.

60. TO DEVISEES OF DECEASED PURCHASER.

taments and premises, (*To uses to prevent dower, in favour of the son, ut ante, p.* 73); AND each of them the said [*vendors*], so far as respects his one undivided moiety or equal half part of the said hereditaments and premises, and the acts and deeds relating thereto, and not further or otherwise, doth hereby separately for himself, and for his heirs, executors, and administrators, covenant with the said [*releasee to uses*], and his heirs, in manner following, (that is to say), that notwithstanding any act, deed, matter, or thing whatsoever, made, done, committed, or suffered to the contrary by them the said [*vendors*], or either of them, they, or one of them, have or hath good right, full power, and lawful and absolute authority by these presents to appoint, release, and assure the said hereditaments and premises to the uses and in manner aforesaid, according to the true intent and meaning of these presents; *And also*, that the said hereditaments and premises, and every part thereof, shall or lawfully may from time to time, and at all times for ever hereafter, remain, continue, and be to the uses and upon and for the trusts, intents, and purposes hereinbefore limited, expressed, and declared of or concerning the same, and be peaceably and quietly held and enjoyed, and the rents and profits thereof, and of every part thereof, be received and taken accordingly, without any interruption or denial whatsoever, of, from, or by them the said [*vendors*], or either of them, or the heirs of them or of either of them, or any other person or persons whomsoever lawfully claiming by, from, through, under, or in trust for them or either of them; *And that* free and clear, and freely and clearly acquitted, released, and discharged, or otherwise by them the said [*vendors*] respectively, and their respective heirs, executors, or administrators, at their costs and charges, well and sufficiently saved harmless and kept indemnified of, from, and against all and all manner of former and other adverse estates, titles, charges, liens, and incumbrances whatsoever, had, made, done, committed, or suffered by the said [*vendors*], or either of them, or any person or persons whomsoever rightfully claiming or to claim by, from, through, under, or in trust for them or either of them, or by, through, or with the acts, defaults, privity, consent, or procurement of them or of either of them; *And moreover*, that they the said [*vendors*] respectively, and their respective heirs, and all persons whosoever lawfully or equitably claiming, or to claim, any estate or interest in the said

Covenants by vendors, each as to his share,

—that they have power to appoint:

—that land shall remain to uses,

free from incumbrances;

and for further assurance.

hereditaments and premises, or any part thereof, by, from, through, under, or in trust for them or either of them, will and shall, from time to time, and at all times hereafter, upon every reasonable request of any person or persons entitled or to be entitled to any estate or interest under the uses or trusts hereinbefore contained, and at the costs and charges of the person or persons by whom such request shall be made, make, do, and execute, or cause or procure to be made, done, and executed, all such further and other lawful acts, deeds, conveyances, and assurances in the law whatsoever, for the more effectually appointing, conveying, confirming, or otherwise assuring the said hereditaments and premises to the uses, and upon and for the trusts, intents, and purposes hereinbefore limited and declared of and concerning the same, according to the true intent and meaning of these presents, as by the person or persons making such request, or his, her, or their counsel in the law, shall be devised, or advised and required. In witness &c.

60. TO DEVISEES OF DECEASED PURCHASER.

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61. RELEASE *in Fee by* DEVISEES, *being* TENANTS *in* COMMON IN FEE, *in* EXECUTION *of a* CONTRACT FOR SALE *by the* TESTATOR (*a*).

61. BY TWO DEVISEES OF DECEASED VENDOR, (TENANTS IN COMMON).

THIS INDENTURE, made the —— day of ——, BETWEEN [*grantors*], of &c., of the one part; and [*purchaser*], Parties.

(*a*) This precedent exemplifies the form of a conveyance by tenants in common, being devisees of a deceased owner, who, subsequently to the will, had sold the property, but died before the execution of the conveyance. In such a case, as the contract revokes the will in equity, only the legal estate passes to the devisees, from whom, therefore, the purchaser must take his conveyance. Hence it follows, that, if the limitations in the will are such as would render it inconvenient or impossible for the persons interested under those limitations to vest a good title in the purchaser, as, where the devise is to uses in strict settlement, a testator, who has contracted for the sale of property so devised, ought, immediately after the sale, to execute a short codicil, vesting it in trustees, upon trust to carry into effect his contract, and directing also the destination of the purchase-money, unless it be intended that it shall fall into the general personal estate. The executor or administrator, where he is not also the devisee of the property, (as occurs in the present instance), will be an additional party to the conveyance, for the purpose of acknowledging the receipt of the purchase-money. And it

Remarks upon the precedent in the text.

61. BY TWO DEVISEES OF DECEASED VENDOR, (TENANTS IN COMMON).

of &c., of the other part. WHEREAS [*vendor*], of &c., being seised for an estate in fee-simple in possession of the hereditaments hereinafter mentioned, by his last will and testament in writing, bearing date the —— day of ——, gave, devised, and bequeathed all his real estate, whatsoever and wheresoever, and the residue of his personal estate, unto and to the use of his sons, the said [*grantors*], their heirs and assigns, for ever, as tenants in common, and appointed the said [*grantors*] executors of his said will. AND WHEREAS the said [*vendor*] departed this life without having revoked or altered the hereinbefore-recited gifts contained in his said will, and the same will was, on the —— day of —— last, duly proved by the said [*grantors*] in the Prerogative Court of the Archbishop of Canterbury. AND WHEREAS, subsequently to the date and execution of the hereinbefore-recited will, namely, on the —— day of ——, the said [*vendor*] entered into a contract in writing with the said [*purchaser*], for the absolute sale to him the said [*purchaser*] of the messuage or tenement, lands, and hereditaments hereinafter described, and intended to be hereby released, for an estate of inheritance in fee-simple, free from all incumbrances, at the price of £——, to be paid to the said [*vendor*] immediately on the execution of the deed or deeds of conveyance of the said hereditaments. AND WHEREAS the said contract remained unexecuted and unperformed at the time of the decease of the said [*vendor*], the said purchase-money of £——, or any part thereof, not having been paid by the said [*purchaser*], and no conveyance of the said hereditaments contracted to be sold, or of any part thereof, having been made or executed by the said [*vendor*]. AND WHEREAS the said [*purchaser*] has requested the said [*grantors*] to carry into effect the said contract entered into by the said [*vendor*], by conveying and assuring the said messuage or tenement, lands, and hereditaments, in manner hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract entered into by the said [*vendor*] with the said [*purchaser*], and in consi-

Recital of vendor's will;

—vendor's death;

—contract for sale;

—that contract was not executed in vendor's lifetime;

—purchaser's desire that premises should be limited to uses after mentioned.

Testatum.

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may be observed, that where, for any cause, as that of the deceased vendor having made a voluntary settlement of the sold property, or otherwise, the contract could not have been enforced by him against the purchaser, the persons interested in his personal estate are not entitled to insist on its being carried into effect, and, therefore, the property remains unconverted. See *Johnson* v. *Legard*, Turn. & R. 281.

61. BY TWO DEVISEES OF DECEASED VENDOR, (TENANTS IN COMMON).

deration of the sum of £——, of lawful British money, to the said [*grantors*] in hand paid by the said [*purchaser*], on or immediately before the execution of these presents, the receipt of which sum of £—— they the said [*grantors*] do hereby acknowledge, and from the same do, and each of them doth, release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, They the said [*grantors*], according to their respective parts or shares aforesaid, by these presents, made &c., (*ut ante, p.* 72), *Do*, and each of them *Doth*, grant, bargain, sell, and release unto the said [*purchaser*] and his heirs, ALL THAT &c., (*parcels and general words, ut ante, p.* 73); TO HAVE AND TO HOLD the said messuage or tenement, lands, hereditaments, and premises unto the said [*purchaser*] and his heirs, TO THE USE of the said [*purchaser*], his heirs and assigns, for ever (*or, to uses to prevent dower, ut ante, p.* 73). AND each of them the said [*grantors*] (*b*), so far as relates to his respective undivided moiety of and in the said messuage or tenement, lands, and hereditaments, and not further or otherwise, doth for himself, and his respective heirs, executors, and administrators, covenant with the said [*purchaser*] and his heirs, by these presents, in manner following, (that is to say), that, for and notwithstanding any act, deed, matter, or thing whatsoever by them the said [*grantors*], or either of them, or by the said [*vendor*] deceased, made, done, omitted, committed, or executed, or knowingly suffered to the contrary, they the said [*grantors*], or one of them, now have or hath in themselves or himself good right, full power, and lawful and absolute authority, to grant, bargain, sell, release, and convey the said hereditaments and premises, to the use of the said [*purchaser*], his heirs and assigns for ever (*c*), in manner aforesaid, according to the true intent and meaning of these presents; And that it shall be lawful for the said [*purchaser*], his heirs and assigns, from time to time, and at all times hereafter, peaceably and quietly to hold and enjoy the said hereditaments and premises intended to be hereby released, with their appurtenances, and to receive and take the rents and profits thereof, and of

Grantors, in consideration of purchase-money, convey to purchaser.

Habendum.

Use.

Covenants by grantors,

that they have right to convey,

and for peaceable enjoyment,

(*b*) When the purchase-money does not go to the conveying parties, they of course would object to covenant for the title. In that case, the parties beneficially entitled to the monies arising from the sale should enter into the covenant.

(*c*) If the property is limited to uses to prevent dower, vary this covenant ut ante, p. 76.

61. BY TWO DEVISEES OF DECEASED VENDOR, (TENANTS IN COMMON).

every part thereof, for his and their own use and benefit, without any lawful eviction, interruption, claim, or demand whatsoever, of or by them the said [*grantors*], or either of them, or the heirs of them or of either of them, or of or by any other person or persons lawfully or equitably claiming, or to claim, by, from, or under, or in trust for them or any of them, or from, under, or in trust for the said [*vendor*], deceased; *And that* free and clear, and freely and clearly, and absolutely acquitted, exonerated, released, and for ever discharged, or otherwise by the said [*grantors*], and each of them, and the heirs, executors, and administrators, of them and of each of them, kept harmless and indemnified, of, from, and against all and all manner of estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already or to be hereafter made, executed, occasioned, or suffered by the said [*grantors*], or either of them, their or either of their heirs, or by any other person or persons lawfully claiming by, from, under, or in trust for them or any of them, or by, from, under, or in trust for the said [*vendor*] deceased, or by, through, or with the acts, default, privity, consent or procurement of them or of any of them; AND *further*, that they the said [*grantors*], and each of them, and the heirs of them and of each of them, and all and every other persons or person lawfully claiming any estate, right, title, or interest whatsoever, either at law or in equity, in, to, or out of the said hereditaments and premises, by, from, under, or in trust for them the said [*grantors*], or either of them, or by, from, under, or in trust for the said [*vendor*], deceased, will and shall, from time to time, and at all times hereafter, upon the request and at the costs of the said [*purchaser*], his heirs or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all such further and other lawful acts, deeds, things, devices, conveyances, and assurances in the law whatsoever, for the more effectually granting, conveying, and assuring of the said hereditaments and premises unto and to the use of the said [*purchaser*], his heirs and assigns(*d*), for ever, in manner aforesaid, and according to the true intent and meaning of these presents, as by the said [*purchaser*], his heirs or assigns, or his or their counsel in the law, shall be reasonably advised or required; [so as &c., *ut ante, p.* 77.] IN WITNESS &c.

free from incumbrances;

and for further assurance.

(*d*) If the property is limited to uses to prevent dower, vary the covenant, ut ante, p. 77.

62. APPOINTMENT *by a* MARRIED WOMAN *under a general* POWER *of* APPOINTMENT, *the Purchase-money being paid to the* HUSBAND, *who* COVENANTS *for the* TITLE. *(Variation where the Purchase-money is paid to a Trustee as the separate Property of the Wife).* 62. APPOINTMENT BY A MARRIED WOMAN.

THIS INDENTURE, made the —— day of ——, BETWEEN [*wife*], the wife of [*husband*], of &c., of the first part; the said [*husband*], of the second part; and [*purchaser*], of &c., of the third part. WHEREAS, by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, in the year ——, and expressed to be made between the said [*wife*], by her then name and description of [*maiden name*], of the one part; and [A. B.], of the other part, ALL THOSE (*describe parcels*), were (with other hereditaments), conveyed and assured, and now stand limited to and for the use and behoof of such person and persons, for such estate and estates, use and uses, whether absolute or conditional, and with or without power of revocation and new appointment, as she the said [*wife*], then [*maiden name*], whether married or sole, should from time to time, and at any time thereafter, in or by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of two or more credible witnesses attesting the same, direct, limit, or appoint; and for want of and subject to such limitation or appointment, *To the use* of the said [*wife*], then [*maiden name*], and of her heirs and assigns, for ever. AND WHEREAS the said [*maiden name*], on or about the —— day of ——, intermarried with and is now the wife of the said [*husband*]. AND WHEREAS the said [*husband*], at the request of the said [*wife*], hath contracted with the said [*purchaser*] for the absolute sale to him of the said hereditaments and premises hereinbefore described, and the fee-simple and inheritance thereof, free from incumbrances, at or for the price or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— sterling already paid by the said [*purchaser*] to the said [*husband*], at the request and by the direction of the said [*wife*] (*a*), the receipt and pay-

Parties.

Recital of settlement;

—marriage of donee of power;

—contract for sale.

Testatum.

In consideration of purchase-money paid to the

(*a*) Sometimes the purchase-money is paid to a trustee on behalf of Variation

62. APPOINTMENT BY A MARRIED WOMAN.

husband, donee of power appoints

ment of which sum, and that the same is in full for the absolute purchase of the hereditaments hereby appointed, and the fee-simple and inheritance thereof, free from all incumbrances whatsoever, the said [*husband*] and [*wife*] do hereby respectively acknowledge, and therefrom do, and each of them doth, release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns; the said [*wife*], pursuant to and by virtue and in exercise of the power or authority given or reserved to her by the said indenture of release, and of every other power or authority whatsoever in anywise enabling her in this behalf, by this present deed or writing, sealed and delivered by her in the presence of the two credible persons whose names are intended to be hereupon indorsed as witnesses attesting her execution of these presents, DOTH absolutely and irrevocably direct, limit, and appoint that the said messuage or tenement, lands, hereditaments, and premises, hereinbefore described and comprised in the said indentures of lease and release, and every part of the same, with their and every of their rights, members, and appurtenances, shall from henceforth remain, continue, and be TO THE USE of the said [*purchaser*], his heirs and assigns, for ever (*b*). (*Add covenants by the husband, that, notwithstanding any act, &c. by the wife, she has power to appoint, and for quiet enjoyment, free from incumbrances created or occasioned by the wife, and for further assurance, ut ante, p.* 159). IN WITNESS &c.

to the use of the purchaser in fee.

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where purchase-money is paid to a trustee as the separate property of the wife.

the wife as her separate property, and in that case the clause in the text may be varied as follows:—

"In consideration of the sum of £——, of &c., paid by the said [*purchaser*] to the said [*trustee*], at the request and by the direction of the said [*wife*], which sum of £—— she doth hereby appoint to be held by the said [*trustee*], In trust for the sole and separate use of her the said [*wife*]."

As to the addition of a release to the appointment in certain cases.

(*b*) Where the lands, in default of appointment by the wife, are limited to the husband, or to a trustee for the wife, it would be proper, according to the precaution usual in cases of this nature, to add a release to the appointment. But where the limitation over in default is, as in the present instance, to the wife herself, unless the purchaser is disposed to incur the additional expense of having the deed acknowledged by her, he generally relies for the sufficiency of his conveyance wholly upon the validity of the appointment, and therefore should be the more vigilant in ascertaining that the requisitions of the power in regard to attestation, &c. are duly attended to.

63. ASSIGNMENT *of* LEASEHOLDS, *vested in the* TRUSTEES *of a* MARRIAGE SETTLEMENT, *subject to an* ABSOLUTE POWER *of* APPOINTMENT *in the* WIFE. *The* HUSBAND COVENANTS *for the* TITLE (*a*), *and for the* PRODUCTION *of the* SETTLEMENT.

63. ASSIGNMENT OF LEASEHOLDS BY A MARRIED WOMAN AND HER TRUSTEES.

THIS INDENTURE, made the —— day of ——, BETWEEN [*trustees*], of &c., of the first part; [*wife*], wife of [*husband*], of &c., of the second part; the said [*husband*], of the third part; and [*purchaser*], of &c., of the fourth part. WHEREAS, by indenture of lease, bearing date on or about the —— day of ——, and made between [*lessor*], therein described, of the one part, and the said [*wife*], then [*maiden name*], of the other part, for the considerations therein mentioned, the said [*lessor*] did demise unto the said [*wife*], her executors, administrators, and assigns, ALL THAT &c., (*parcels, consisting of land and a messuage*); *To hold* the same unto the said [*wife*], her executors, administrators, and assigns, during the term of —— years thence next ensuing, at the yearly rent of £——, payable quarterly, and subject to certain conditions and covenants therein contained, on the part of the said [*wife*], her executors, administrators, and assigns, to be observed and performed. AND WHEREAS, by an indenture of settlement, bearing date on or about the —— day of ——, made between the said [*husband*], of the first part, the said [*wife*], then [*maiden name*], of the second part, and the said [*surviving trustees*] and [*deceased trustee*], now deceased, of the third part, (being the settlement executed previously to the marriage then intended to be and

Parties.

Recital of lease;

—of settlement;

(*a*) The husband is made a party, not for the purpose of perfecting the title, which would be complete without his concurrence, but in order to covenant for the title and the production of the settlement. In such a case as the present, the husband is the only person from whom such covenants can be obtained, for the wife is incapable of binding herself by covenant; and the trustees, having no beneficial interest, would object to incur any personal responsibility. The husband, of course, is under no obligation to enter into the covenants, unless he has specially contracted with the purchaser to do so. Trustees, therefore, who contract for the sale of property, the beneficial interest in which belongs to a married woman, should, to prevent dispute with respect to the covenants, announce this fact to the purchaser.

As to the husband's covenants for the title.

63. ASSIGNMENT OF LEASEHOLDS BY A MARRIED WOMAN AND HER TRUSTEES.

since solemnized between the said [*husband*] and [*wife*], his wife), the said [*wife*] assigned unto the said [*trustees*], their executors, administrators, and assigns, the said leasehold —— and premises; *To hold* unto the said [*trustees*], their executors, administrators, and assigns, for all the residue then unexpired of the said term of —— years; *Upon trust* (after the solemnization of the said marriage) that the said [*trustees*], their executors, administrators, and assigns, should, from time to time and at all times thereafter, assign and transfer the said trust premises to such person or persons, in such shares and proportions, for such estate and interest, upon such trusts, and to and for such intents and purposes, and with, under, and subject to such powers, provisions, declarations, and limitations, and in such manner as the said [*wife*] should, notwithstanding the said then intended coverture, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by will declare, limit, direct, or appoint, give, or bequeath the same; and for default of, and in the meantime and until some such declaration, limitation, direction, or appointment, gift, or bequest should be made as aforesaid, *Upon trust* to pay and apply the rents and profits thereof unto the said [*wife*], during the joint lives of herself and the said [*husband*], for her sole and separate use and benefit, exclusive of the said [*husband*], and not to be subject or liable to his debts, control, or engagements; And after the decease of the said [*wife*], upon certain trusts in the said indenture mentioned.

—death and burial of one of the trustees;

And whereas the said [*deceased trustee*] departed this life in or about the month of ——, leaving the said [*surviving trustees*], his co-trustees, him surviving, and was interred in the burial-ground of the parish of ——.

—contract for sale.

And whereas the said [*trustees*], at the request of the said [*wife*], have contracted with the said [*purchaser*] for the absolute sale of the said leasehold premises, at the price or sum of £——, And the said [*husband*], at the request of the said [*wife*], has agreed to enter into the covenants on his part hereinafter contained.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £——, of lawful British money, paid by the said [*purchaser*] (*b*) to the said

In consideration of purchase-money, trustees,

(*b*) If the purchase-money is paid to the husband, say—

Variation where purchase-money is paid to

"to and for the absolute use of the said [*husband*], by the

63. ASSIGNMENT OF LEASEHOLDS BY A MARRIED WOMAN AND HER TRUSTEES.

[*wife*], as and for her separate monies and estates, (with the privity of the said [*husband*]), at or immediately before the execution of these presents, the receipt whereof, and that the same is in full for the absolute purchase of the premises hereby assigned, she the said [*wife*] doth hereby acknowledge, and from the same she and the said [*husband*], her husband, do, and each of them doth, release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns; And also, in consideration of 10*s.*, at the same time paid by the said [*purchaser*] to the said [*trustees*], the receipt whereof is hereby acknowledged, They the said [*trustees*], at the request and by the direction of the said [*wife*], testified by her executing these presents in the presence of the two credible witnesses whose names are intended to be hereupon indorsed, *Do*, and each of them *Doth*, by these presents, bargain, sell, assign, and transfer; And the said [*wife*] *Doth*, by this deed or writing, sealed and delivered by her, and attested as aforesaid, grant and confirm, limit, direct, and appoint, And also the said [*husband*] *Doth*, by these presents, grant and confirm, unto the said [*purchaser*], his executors and administrators, all and singular the piece or parcel of ground, messuage or tenement, hereditaments and premises, hereinbefore described, and all other the premises, if any, comprised in and demised by the hereinbefore-in-part-recited indenture of lease; And all and singular the rights, members, and appurtenances to the said premises or any part thereof belonging or appertaining, or therewith usually held or enjoyed; Together with the said indenture of lease, and the full and whole force, benefit, and effect thereof; And all the estate, right, title, interest, benefit, claim, and demand whatsoever, both at law and in equity, of them the said [*trustees*], [*wife*], and [*husband*] respectively, in and to the said premises, and every part thereof. TO HAVE AND TO HOLD the said hereditaments and premises unto the said [*purchaser*], his executors, administrators, and assigns, henceforth for all the residue and remainder now to come and unexpired of the said term of —— years, granted by the hereinbefore-recited indenture of lease, and for all other the estate, term, and interest of them the said [*trustees*], [*wife*], and [*hus-*

by direction of wife, assign to purchaser.

Parcels.

General words.

All the estate, &c.

Habendum.

---

direction of the said [*wife*], testified by her executing these presents."

the husband.

63. ASSIGNMENT OF LEASEHOLDS BY A MARRIED WOMAN AND HER TRUSTEES.

band], respectively, in or to the said premises, or any part thereof; subject, nevertheless, to the payment of the rent, and the observance and performance of the covenants, conditions, and agreements respectively reserved and contained in and by the said indenture of lease, and which, on the part of the said [*wife*], her heirs, executors, administrators, or assigns, ought henceforth to be paid, observed, and performed. AND the said [*trustees*], for themselves respectively, and their respective heirs, executors, and administrators, but each of them as to and concerning his own acts, deeds, and defaults only, hereby severally covenant with the said [*purchaser*], his executors and administrators, that they the said [*trustees*], have not, nor hath either of them, at any time heretofore, made, done, executed, or permitted any act, deed, matter, or thing, by means whereof the said premises hereby assigned, or intended so to be, or any part thereof, are or is charged, encumbered, or in anywise prejudicially affected in title, estate, or otherwise howsoever. AND the said [*husband*], for himself, his heirs, executors, and administrators, hereby covenants with the said [*purchaser*], his executors and administrators, That, notwithstanding any act, deed, matter, or thing whatsoever, made or done, or permitted to be made or done, to the contrary by the said [*wife*], [the said indenture of lease is a good, valid, and subsisting lease in the law for the premises thereby demised, and is still in full force for all the residue now unexpired of the said term of —— years thereby granted (*c*); *And that*, notwithstanding any such act, deed, matter, or thing as aforesaid], the said [*trustees*], [*wife*], and [*husband*], or some of them, have in themselves, or one of them has in himself or herself, full power by these presents to assign, appoint, or otherwise assure the said hereditaments and premises unto the said [*purchaser*], his executors, administrators, and assigns, for all the residue which is now unexpired of the said term of —— years, in manner aforesaid, according to the true intent and meaning of these presents; *And further*, that, subject to the payment of the rent, and the observance and performance of the covenants, conditions, and agreements reserved and contained by and in the said indenture of lease, and which, from the day of the date of these presents, (*or*, from

Covenant by trustees that they have not encumbered.

Covenant by husband that lease is valid;

—that assignors have power to assign;

and, subject to the rent, &c., for quiet enjoyment,

(*c*) This first covenant may be omitted; it is included in the next.

the —— day of —— last, *as the case may be*), ought to be paid, observed, and performed, it shall be lawful for the said [*purchaser*], his executors, administrators, and assigns, henceforth at all times hereafter during the continuance of the said term, to hold and enjoy the said premises, and to take the rents and profits thereof, to and for his and their own use, without any eviction, interruption, or denial whatsoever from or by the said [*wife*], or any person or persons whomsoever, claiming from, through, under, or in trust for her; *And also*, that the said premises are free and discharged, or by the said [*husband*], his heirs, executors, or administrators, will be kept effectually indemnified, from and against all former and other estates, rights, titles, charges, and incumbrances whatsoever, at any time or times heretofore made, created, or occasioned by the said [*wife*], or any person or persons claiming under or in trust for her, or by, through, or with his, her, or their acts, defaults, privity, consent, means, or procurement; *And further*, that the said [*wife*], her executors or administrators, and every other person whosoever claiming any estate, right, title, or interest at law or in equity, in or to or out of the said premises, or any part thereof, from, under, or in trust for her, will, from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said [*purchaser*], his executors, administrators, or assigns, make, do, or execute and perfect every such lawful and reasonable act, deed, assignment, or assurance in the law whatsoever, for more effectually assigning and assuring the said hereditaments and premises unto the said [*purchaser*], his executors, administrators, or assigns, thenceforth, for all the residue or remainder which shall be then unexpired of the said term of —— years, in manner aforesaid, according to the true intent and meaning of these presents, as by the said [*purchaser*], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised and required; *And lastly*, that the said [*husband*], his executors or administrators, (unless prevented by fire or some other inevitable accident), will, at any time or from time to time hereafter, upon every reasonable request in writing, and at the costs and charges of the said [*purchaser*], his executors, administrators, or assigns, produce, or cause or procure to be produced, to him the said [*purchaser*], his executors, administrators, or assigns, or his or their attorney, solicitor, agent,

63. ASSIGNMENT OF LEASEHOLDS BY A MARRIED WOMAN AND HER TRUSTEES.

free from incumbrances;

and for further assurance;

—for the production of the settlement.

63. ASSIGNMENT OF LEASEHOLDS BY A MARRIED WOMAN AND HER TRUSTEES.

or counsel, or before any court or courts of law or equity, or otherwise as occasion shall require, the hereinbefore-recited indenture of settlement of the —— day of ——; And also that the said [*husband*], his executors or administrators, will from time to time, upon the like request and at the like costs and charges of the said [*purchaser*], his executors, administrators, or assigns, furnish, or cause or procure to be furnished to him or them, a copy or abstract of the said indenture, or any part thereof, (the said copy to be properly attested if required), and will also permit the said [*purchaser*], his executors, administrators, or assigns, or any person or persons to be appointed by him or them, to examine and compare the same with the original (*d*). And the said [*purchaser*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*wife*], her executors or administrators, That the said [*purchaser*], his heirs, executors, administrators, or assigns, will, from time to time

As to the husband's covenant for the production of the settlement.

(*d*) Here the settlement was in the possession of the wife, who being incapable of covenanting for its production, the husband agreed to do so. If he had objected to enter into the covenant, the difficulty might have been surmounted by delivering the settlement over to the trustees, and inducing them to covenant for its production; their covenant being qualified, as such covenants usually are, when entered into by persons who have a fiduciary interest only. Vide ante, Vol. 3, p. 643. Of course, it is not necessary to the obligatory force of a covenant for the production of deeds, that the covenanting party should have the custody of them at the time; for if a man covenants to do an act, the performance of which requires the concurrence of a third person, it is his own folly, and the consequences will fall on himself. But as the object of a covenantee in such cases is to secure the production of the deeds, and not to become plaintiff in an action for damages, it is generally matter of prudence for him to ascertain that the proposed covenantor is in such a situation as to render it probable that he will be able to produce the deeds; and a purchaser, it is clear, would not be bound to accept the covenant of any person not having the custody of the deeds. Where it can be done with safety, it is better to deliver the deed of settlement to the purchaser, than contract the indefinite liability incident to a covenant for its production. In the present case, however, it would not be proper to part with the deed, even though it related to no other than the sold property, since it might be necessary for the wife to preserve evidence of the money paid to her being her separate estate, which would best be shewn by the production of the settlement. The weight due to this consideration would depend upon the intended destination of the money. If the wife meant to settle it upon trusts for her separate benefit, the retention of the settlement would be important, but not if she intended to pay it over to her husband.

63. ASSIGNMENT OF LEASEHOLDS BY A MARRIED WOMAN AND HER TRUSTEES.

hereafter, during the residue of the said term of —— years, duly pay the said rent of £——, and observe and perform the several covenants, conditions, and agreements reserved and contained by and in the said indenture of lease, on the part of the said [*wife*], her heirs, executors, administrators, or assigns, to be respectively paid, observed, and performed; And also will, at all times hereafter, effectually keep indemnified the said [*wife*], her heirs, executors, and administrators, from and against all actions, suits, and other proceedings, and also from and against all losses, damages, and expenses, by reason of the non-payment of the said rent, or the non-observance or non-performance of the said covenants, conditions, and agreements, or any of them, or by reason of any other matter or thing in anywise relating thereto (*e*). IN WITNESS &c.

Covenant by purchaser to indemnify the wife from the rent and covenants.

(*e*) This covenant is made with the wife, because she is subject to the covenants entered into by her while sole as lessee; and though the trustees of the settlement were liable to the rent and covenants, as assignees of the term, yet, as this liability was contemporaneous with their ownership only, and ceased on the alienation of their interest by the present deed, (except, of course, as to any breach previously made), it is unnecessary, and would therefore be incorrect, to make the covenant extend to them.

Remarks upon the indemnity covenant.

And here it may be suggested, that, where trustees of a settlement, who are invested with a power of sale, dispose of leaseholds, perhaps it may be a question whether they can require from the purchaser, on behalf of the settlor, not being a necessary concurring party in the sale, an indemnity against the rent and covenants of the lease. It has been decided that assignees in bankruptcy are not entitled to make such a requisition on the part of the bankrupt; (vide ante, p. 172); and that case is not very broadly distinguishable from the present; for it is the duty of trustees to make the most of the property for the benefit of the cestuis que trust, in like manner as it is the duty of assignees to deal with the bankrupt's property to the utmost advantage on the part of the creditors. If trustees cannot, without an express stipulation, require such a covenant, it would probably be deemed wrong in them to prejudice the sale by making it the subject of express stipulation in the contract. It has been decided that a purchaser, even without any express covenant, is bound to indemnify the vendor against the covenants of the lease during the time he is in possession as assignee; *Burnett* v. *Lynch*, 5 B. & C. 589; but where the vendor himself is not liable, of course this principle has no room to operate.

64. PURCHASE BY TRUSTEES UNDER A POWER.

64. RELEASE *in* FEE *on a* PURCHASE *by* TRUSTEES *under a* POWER *in a Marriage Settlement, with the Consent of the Parties beneficially interested* (*a*); *the Conveyance being made to the Uses of the Settlement.*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; [*husband*], of &c., and [*wife*], his wife, of the second part; and [*purchasers*], of &c., of the third part. (*Recite the assurance or other means by which the vendor became seised in fee*). AND WHEREAS, by indentures of lease and release, bearing date respectively the —— and —— days of ——, the indenture of release being made between the said [*husband*], of the first part; the said [*wife*], then [A. B.], spinster, of the second part; and the

Recital of settlement, containing the power to purchase.

Difference in mode of conveyance, where the trustees take the legal estate, and where not.

(*a*) Where the trustees of a settlement are empowered to lay out trust-monies in the purchase of lands, it is usual not to disclose the trusts upon the face of the deed of conveyance, but to convey the property to them simply as absolute owners, making them declare the trusts by a separate deed; the advantage of which course is, that it prevents the unnecessary disclosure of the affairs of families, and also that it enables the trustees to sell again as beneficial owners; the propriety of such a proceeding of course depending upon the nature of the trust. The trustees might indeed sell, even if the conveyance were made expressly upon the trusts of the settlement, provided the sale were consistent with the trusts; but there would even then be this inconvenience, that the settlement having become part of the evidence of title, any person purchasing from the trustees would require a covenant from them for the production of it, the necessity for which would be avoided where they both buy and sell as beneficial owners; but in the latter case they would be expected to enter into the usual vendor's covenants for title, unless they precluded the requisition by express stipulation. On the other hand, where the legal inheritance is not to be vested in the trustees, but the property is to be conveyed to the uses of the settlement, as in the present case, it is impossible to avoid disclosing the settlement without the circuity of two conveyances, and this would be attended with little advantage, since, on any future sale of or dealing with the property, the settlement would not be kept out of view, inasmuch as the legal as well as beneficial interest is subject to the limitations in the settlement; and therefore the trustees must expressly exercise their power of sale and revocation in order to vest the property in the purchaser. The precedent in the text, it will be seen, has been prepared in this form.

It may be farther observed, that, where the trusts under which a purchase of lands is made are created by will, the reasons which have been suggested for not disclosing the trusts on the face of the deed of conveyance do not apply, as a will is a public document.

64. PURCHASE BY TRUSTEES UNDER A POWER.

said [*purchasers*], of the third part, (being the settlement executed previously to the marriage of the said [*husband*] and [*wife*], his wife), certain freehold hereditaments were conveyed and assured to the uses, upon the trusts, and for the intents and purposes, and subject to the powers, provisoes, and declarations therein expressed and declared concerning the same (*b*). And in and by the said indenture, 5000*l.* 3*l.* per Centum Consolidated Annuities were settled and assured upon certain trusts therein mentioned. In which indenture of settlement was contained a power enabling the said [*purchasers*], or the survivor of them, or the executors or administrators of such survivor, with the consent in writing of the said [*husband*] and [*wife*], his wife, or the survivor of them, to sell and dispose of the said 5000*l.* 3*l.* per Centum Consolidated Annuities, or any part thereof, and to lay out and invest the monies arising from such sale in the purchase of freehold or copyhold hereditaments held for an estate in fee-simple; and which hereditaments, when so purchased, should be settled and assured to the uses, upon the trusts, and subject to the powers, provisoes, and declarations expressed and declared concerning the freehold hereditaments thereby settled and assured, or such of the said powers, provisoes, and declarations as should be then subsisting, undetermined, and capable of taking effect. AND WHEREAS the said [*purchasers*], in pursuance of the said power contained in the said indenture of settlement, have, with the consent of the said [*husband*] and [*wife*], testified by their severally executing these presents, contracted and agreed with the said [*vendor*] for the absolute purchase of

Contract for purchase.

(*b*) If the limitations in the settlement are recited, the recital in the text will be varied thus:—

Variation where uses of settlement are recited.

"To the uses, &c. thereinafter expressed and declared, and hereinafter recited concerning the same, (that is to say), To the use," &c., (*setting forth the uses at length*).

But, where brevity is desirable, (and where is it not desirable?), the statement of the uses of the settlement may be dispensed with, reference being made to them merely as in the precedent in the text. Indeed, little or no advantage is gained by the recital of the limitations, (except, perhaps in the event of the settlement being lost), since such a recital, however copious, would not induce a purchaser from the trustees selling under a power in the settlement, or from the cestuis que use, to dispense with the production of the settlement, and having its future production secured to him by covenant.

64. PURCHASE BY TRUSTEES UNDER A POWER.

the —— and hereditaments hereinafter described, and intended to be hereby released, for an estate of inheritance in fee-simple, free from all incumbrances, at or for the price or sum of £——; and the said [*purchasers*], for the purpose of enabling them to pay the said purchase-money, have, with such consent as aforesaid, sold out a sufficient part of the said 5000*l.* 3*l.* per Centum Consolidated Annuities, which were vested in them upon the trusts of the hereinbefore-recited indenture of settlement as aforesaid.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of the sum of £—— sterling, paid by the said [*purchasers*] to the said [*vendor*], at or immediately before the execution of these presents, with the consent and approbation of the said [*husband*] and [*wife*], his wife, testified by their severally executing these presents, (being the monies produced by the sale of part of the said 5000*l.* 3*l.* per Centum Consolidated Annuities as aforesaid), the receipt of which sum the said [*vendor*] doth hereby acknowledge, and therefrom doth release and discharge the said [*purchasers*], their heirs, executors, administrators, and assigns, the said [*vendor*] DOTH, by these presents, made &c., grant, bargain, sell, and release unto the said [*purchasers*] and their heirs, (*parcels, and general words*);

Vendor, in consideration of purchase-money, releases to purchasers.

Habendum.

And all the estate &c., together with all deeds, &c. To HAVE AND TO HOLD THE SAID hereditaments and premises unto the said [*purchasers*], and their heirs, for ever, To THE USES, upon the trusts, and for the intents and purposes, and subject to the powers, provisoes, and declarations in and by the hereinbefore-recited indenture of release or settlement expressed and declared concerning the freehold hereditaments thereby released, or such and so many of the said uses, trusts, intents, and purposes, powers, provisoes, and declarations as are now subsisting, undetermined, and capable of taking effect; and to, for, or upon no other use, trust, intent, or purpose whatsoever. (*Add usual covenants for title* (*c*), *ut ante, p.* 75). IN WITNESS &c.

To uses of settlement.

(*c*) It is incumbent on persons who purchase an estate in a fiduciary character to take every proper precaution with regard to the title of the lands purchased. For this purpose, the abstract should be submitted to counsel, and the purchasers should not take upon themselves to accept any title which cannot be pronounced to be marketable; though it is usual and proper to give trustees a discretionary power to purchase under restrictive conditions as to title.

65. ASSIGNMENT *of* LEASE *of a* MESSUAGE *and certain scheduled* FIXTURES (*a*), *&c., in Consideration of the Assignee taking upon himself the Rent and Covenants, by Indorsement. Variation where the Assignment is made by a* HUSBAND *under his marital Power.* (*Short Form.*)

65. ASSIGNMENT OF LEASE AND FIXTURES BY INDORSEMENT.

THIS INDENTURE, made the —— day of ——, BETWEEN the within-named [*assignor*] (*b*), of the one part; and [*assignee*], of &c., of the other part. WHEREAS the said [*assignee*], for the considerations hereinafter mentioned, hath agreed to purchase from the said [*assignor*] (*b*) the within-mentioned messuage or tenement and premises, together with the several goods, chattels, and effects hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of a bond or obligation, bearing even date with these presents, given by the said [*assignee*] to the said

Parties.

Recital of contract.

Testatum.

(*a*) Personal chattels pass by delivery, and a deed of assignment is not necessary to confer a title to them. The only advantage of specifying them in the present instance is, that evidence is thereby afforded of the contract between the assignor and assignee; and if a claim were set up to the fixtures by the lessor, it would be convenient for the assignee to be furnished with evidence of such contract, though, of course, it would not conclude the lessor. The covenant as to the assignor's right to assign the fixtures, would enable the assignee to maintain an action against the assignor, in case of the property being proved to belong to any other person. Where a large pecuniary consideration is paid for the purchase of chattels, an objection to assigning them by deed is, that the instrument is subject to an ad valorem duty; for it is to be observed, that, where parties choose to assign, by a written instrument, any property to the transfer of which no written instrument is necessary, the price paid must be set forth, and the duty attaches precisely in the same manner as if the instrument had been requisite to vest in the purchaser a title to the property; for though the parties need not have had a deed at all, yet, having one, they must impress it with the proper stamp. Tenants' fixtures have been held not to be "goods, wares, and merchandise," agreements relating to the sale of which are exempted by the Stamp Act from the agreement stamp. *Wick* v. *Hodgson*, 12 B. Moore, 213; [2 Scott, 249; ante, Vol. 1, p. 732.]

As to the transfer of personal chattels.

Stamp.

(*b*) "and [*wife*] his wife."

65. ASSIGNMENT OF LEASE AND FIXTURES BY INDORSEMENT.

[*assignor*], conditioned for the payment of the rent and the performance of the covenants reserved and contained on the lessee's part, by and in the within-written indenture of lease, he (*c*) the said [*assignor*] DOTH, by these presents, grant, bargain, sell, and assign unto the said [*assignee*], his executors and administrators, ALL AND SINGULAR the messuage or tenement and premises intended to be demised by the within-written indenture of lease, with their appurtenances, *And* all the estate, right, title, interest, property, claim, and demand whatsoever of (*d*) him the said [*assignor*] in, to, or upon the same premises, together with the said indenture of lease, and together also with the household goods, tenant's fixtures, chattels, and effects particularly mentioned in the schedule hereunder written. TO HAVE AND TO HOLD the said messuage or tenement, with the appurtenances, unto the said [*assignee*], his executors, administrators, and assigns, from the day of the date hereof during all the remainder now unexpired of the term of twenty years and one quarter of another year, wanting fourteen days, granted by the within-written indenture of lease; *subject nevertheless* to the payment of the rent and performance of the covenants respectively by and in the same indenture of lease reserved and contained on the tenant's or lessee's part henceforth to be paid and performed; *and subject* also to a certain underlease of part of the said messuage or tenement and premises granted by the said [*assignor*] to [*underlessee*], of &c., by indenture, bearing date the —— day of —— now last past, for the term of seven years from the —— day of —— then instant, at the yearly rent of £—— (*e*). AND TO HAVE AND TO HOLD the said goods, tenant's fixtures, chattels, and effects, unto the said [*assignee*], his exe-

Assignor, in consideration of bond, assigns to purchaser the premises comprised in the lease.

Habendum as to messuage.

Subject to an underlease.

Habendum as to fixtures.

(*c*) "They the said [*assignor*] and [*wife*], his wife, Do, and each of them DOTH."

(*d*) "Them the said [*assignor*] and [*wife*], his wife, respectively, in, to," &c.

Form of assignment where there is an underlease.

(*e*) In conveying property, part of which has been underlet, it is very improper to except the part so demised, (as is sometimes done), if the intention is to vest in the purchaser the benefit accruing to the lessor under the demise, which such an exception defeats; and the specification of the rent reserved does not answer the same purpose, because, if the rent is severed, as in that case it would be, from the reversion, it does not carry the right of distraining,—the landlord's most valuable remedy. The proper mode is to convey the *whole* property *subject* to the lease.

65. ASSIGNMENT OF LEASE AND FIXTURES BY INDORSEMENT.

cutors, administrators, and assigns, as his and their own absolute property, for ever, subject nevertheless to the right and interest of the said [*underlessee*] in such of the said goods, tenant's fixtures, chattels, and effects as are mentioned in a schedule written under the said indenture of lease of the —— day of —— last (*f*). AND the said [*assignor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*assignee*], his executors and administrators (*g*), That, notwithstanding any act, deed, matter, or thing whatsoever, done, executed, occasioned, or suffered by the said [*assignor*], [or by the said [*wife*], his wife], to the contrary, the said [*assignor*] [and [*wife*], his wife], now [have, or one of them] hath full power and lawful and absolute authority to assign or otherwise assure the said leasehold premises in manner aforesaid, according to the true intent and meaning of these presents; *And that* the yearly rent, conditions, and covenants reserved and contained by and in the within-written indenture of lease, on the part of the said lessee therein named to be paid and performed, have been duly paid and performed up to the day of the date hereof; *And that* the said [*assignee*], his executors,

Covenants by assignor.

—that the assignor has right to assign;

—that rent and covenants have been paid and performed up to the day of the date;

—for quiet enjoyment,

(*f*) "And they the said [*assignor*] and [*wife*], his wife, for themselves respectively, and their respective heirs, executors, and administrators, do hereby jointly and severally covenant" &c.

As to making a married woman enter into covenants.

[It is not the practice to make a woman who is understood to be married, enter into covenants, because if she is married she cannot bind herself. And this practice is correct wherever a married woman is made a party to a deed merely for the purpose of testifying her consent or exercising a power to the giving or exercising of which her coverture is no impediment. But when she is joined for the purpose of guarding against the possibility of there being no valid marriage, (and in some ranks of life this possibility is not extremely contingent), or to obviate the necessity of proving the marriage at a future time, consistency obviously requires that the covenants should be framed upon the same principle as the conveying part.]

[Another occasion in which a married woman may properly enter into a contract is where she has separate property, which it is intended should stand charged as a security. But this should be done by an express charge, explicitly declaring the intention and duly notified to the trustees.]

(*g*) In assigning a lease at rack-rent, covenants for title are, of course, less important than where the lease is valuable; but it is not often advisable to omit them.

65. ASSIGNMENT OF LEASE AND FIXTURES BY INDORSEMENT.

administrators, and assigns, shall, or lawfully may, during all the remainder of the said term of twenty years and one quarter wanting fourteen days, granted by the within-written indenture of lease, peaceably and quietly hold and enjoy the said leasehold premises hereby assigned, without any molestation or interruption of the said [*assignor*], [or the said [*wife*], his wife, or] his [or her] executors or administrators, or of any person lawfully claiming through or under him [her] or them; *And that* free and clear of and from all titles, charges, and incumbrances whatsoever, made or knowingly suffered to be made, by the said [*assignor*], [or by the said [*wife*], his wife,] except the hereinbefore-mentioned underlease of the —— day of —— last; *And further*, that the said [*assignor*], [and the said [*wife*], his wife, and] his [and her] executors or administrators, and every other person lawfully claiming from or under him [her] or them, (except the person whose estate and interest are hereinbefore excepted), will at all times hereafter, during the remainder of the said term of twenty years and a quarter of another year wanting fourteen days, at the request, costs, and charges of the said [*purchaser*], his executors, administrators, or assigns, make, do, and execute all such further acts and assurances whatsoever for more effectually assuring the said leasehold premises unto the said [*purchaser*], his executors, administrators, and assigns, for all the residue of the said term which shall be then unexpired, as the said [*purchaser*], his executors, administrators, or assigns, shall reasonably require; *And, lastly*, that the said [*assignor*] [and [*wife*], his wife,] (notwithstanding the act or deed of any person or persons whomsoever) [have or one of them] hath good right and absolute authority to bargain, sell, assign, and transfer the said household goods, tenant's fixtures, chattels, and effects mentioned in the said schedule hereunder written unto the said [*assignee*], his executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents. IN WITNESS &c.

free from incumbrances;

—for further assurance:

—that the assignor has right to assign fixtures.

SCHEDULE.

THE SCHEDULE ABOVE REFERRED TO.

IN the *Front Kitchen*—a leaden cistern, ball cock, with leaden sink and leaden pipe, dresser with three drawers and shelves, pantry, dresser and shelves, and about forty feet of leaden pipe. In the *Back Kitchen*—a leaden cistern, with stone sink, and water-pipe, copper, and ironing board, &c.

66. ASSIGNMENT *of a* LEASEHOLD DWELLING-HOUSE *by a* LESSEE, *indorsed upon the Lease.* (*A very short Form*). 66. SHORT ASSIGNMENT OF LEASEHOLDS.

THIS INDENTURE, made the —— day of ——, BETWEEN the within-named [*lessee*], of the one part; and [*assignee*], of &c., of the other part (*a*); WITNESSETH, that, in consideration of £——, now paid by the said [*purchaser*] to the said [*vendor*], for the absolute purchase of the leasehold messuage or tenement comprised in the within-written indenture of lease, the receipt of which sum the said [*vendor*] doth hereby acknowledge, and from the same doth hereby discharge the said [*purchaser*], his executors, administrators, and assigns, the said [*vendor*] DOTH by these presents grant and assign unto the said [*purchaser*], his executors and administrators, all the messuage or tenement, hereditaments, and premises comprised in and demised by the within-written indenture with their appurtenances. TO HOLD the same unto the said [*purchaser*], his executors, administrators, and assigns, henceforth during all the residue now unexpired of the term of —— years, granted by the within-written indenture, and for all other the term and estate of the said [*vendor*] therein, subject to the payment, observance, and performance of the rents and covenants in the said indenture reserved and contained, and on the lessee's part to be paid, observed, and performed. AND the said [*vendor*], for himself, his heirs, executors, and administrators, hereby covenants with the said [*purchaser*], his executors and administrators, that, notwithstanding any act done or suffered by

Parties.

Testatum.

Assignment.

Habendum.

Covenants by vendor that he has power to assign;

(*a*) [Sometimes, when the existing deed is in the country, and it is desired to avoid the trouble of sending it to town to be carried to the Stamp-office, instead of indorsing the new deed, it is engrossed on fresh parchment, which is *annexed* to the former deed, as if it were a continuation of it. The references will then be to "the above-named A. B." or "the above-recited will," or "the above-written indenture," &c. If this is done, it will be proper to add, after the names of the parties in the new deed, these words:—

"(and annexed or intended to be annexed to an indenture of lease, dated &c., and made &c.")

66. SHORT ASSIGNMENT OF LEASEHOLDS.

the said [*vendor*], he hath now power to assign the premises in manner aforesaid; and that, subject to the payment of the said rent, and to the observance and performance of the said covenants henceforth to be paid, observed, and performed, it shall be lawful for the said [*purchaser*], his executors, administrators, and assigns, peaceably and quietly to hold and enjoy the said hereditaments and premises during all the residue of the said term of —— years, without interruption or disturbance by the said [*vendor*], or any person claiming under him; *And that* free and clear of and from all charges and incumbrances whatsoever created or permitted by him the said [*vendor*], or occasioned by his act, neglect, or default; *And further*, that the said [*vendor*], and every person lawfully claiming through or under him, will, at any time hereafter, on the request and at the costs of the said [*purchaser*], his executors, administrators, or assigns, assign and confirm to him and them the said hereditaments and premises for all the residue of the said term of —— years, in such manner as the said [*purchaser*], his executors, administrators, or assigns, shall direct. AND the said [*purchaser*], for himself, his heirs, executors, and administrators, hereby covenants with the said [*vendor*], his executors and administrators, that he the said [*purchaser*], his executors, administrators, or assigns, will, from time to time, perform and observe the lessee's covenants contained in the said indenture of lease (*b*), and will at all times hereafter indemnify and save harmless the said [*lessor*], his heirs, executors, and administrators, from all losses, damages, and expenses in respect thereof. IN WITNESS &c.

—for quiet enjoyment,

free from incumbrances;

—for further assurance.

Covenant by purchaser to perform covenants.

(*b*) As one of the covenants is for payment of rent, there need not be an express mention of this.

67. [ASSIGNMENT *of a* LEASEHOLD HOUSE *and* POLICY OF FIRE INSURANCE. COVENANT BY VENDOR TO PRODUCE TITLE-DEEDS. (*A very short Form.*)

67. ASSIGNMENT OF LEASEHOLDS: COVENANT TO PRODUCE DEEDS. (SHORT FORM.)

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part, and [*purchaser*], of &c., of the other part. WHEREAS, by indenture made &c., between &c., ALL &c. (*parcels*), were demised to the said [*lessee*], for the term of ninety-eight years and one quarter of a year, from the date of the said indenture, under and subject to certain rents, covenants, and conditions. AND WHEREAS, by indenture made &c., the said hereditaments became vested for the residue of the said term in [*testator*], late of ——, who, by his will, dated &c., and proved at London, on &c., bequeathed the same, with other lands, to [*vendor*] and [A. B.], as tenants in common, and appointed the said A. B. his executor. AND WHEREAS, by indenture of partition, made &c., the hereditaments above described became vested in the said [*vendor*] solely and absolutely, for the residue of the said term. NOW THIS INDENTURE WITNESSETH, that in consideration of £——, already paid by the said [*purchaser*] to the said [*vendor*], the said [*vendor*] grants and assigns the hereditaments above described, and all other the hereditaments demised by the said indenture of lease, and all the legal and equitable estate, right, title, and interest of the said [*vendor*] therein and thereto, [and also the said indenture of lease, and all writings and evidences which concern the said hereditaments and premises solely or principally, and are in the power of the said [*vendor*] to grant, and also a policy of insurance of the said hereditaments from fire by (*a*) the Sun Fire Insurance Company, numbered ——, and the full benefit thereof, (with power for the said [*purchaser*], his executors, administrators or assigns, or his or their substitute or substitutes, as the attorney or attornies irrevocable of the said [*vendor*], in his name to bring actions, and do and take any other lawful acts and proceedings for obtaining the benefit thereof)] unto the said [*purchaser*], his executors, administrators, and assigns,

Parties.
Recital of lease;
—of assignment to testator;
—of bequest;
—of partition.
Testatum.
Vendor assigns parcels,
indenture of lease, fire policy, and all deeds.

[(*a*) Policy "by" the company; Fr. *police*, a promise, from polliceri.]

67. ASSIGNMENT OF LEASEHOLDS: COVENANT TO PRODUCE DEEDS. (SHORT FORM.)

[To HOLD the said hereditaments and premises unto the said [*purchaser*], his executors, administrators, and assigns] (*b*), henceforth, [as to the said leasehold hereditaments and premises,] for the residue of the said term of ninety-eight years and one quarter, subject to the rents, covenants, and conditions aforesaid, henceforth to be paid and performed, [and as to the said policy of insurance absolutely.]

Habendum.

Vendor covenants that lease is valid;

AND the said [*vendor*], for himself, his heirs, executors, and administrators, and for and against the acts and defaults only of himself and of the said [*testator*], covenants with the said [*purchaser*], his executors, administrators, and assigns, that the said lease is now valid and subsisting, and not voidable;

—that rent and covenants have been paid and performed;

And that the rents, covenants, and conditions on the lessee's part have been respectively paid and performed up to the present time; And that the said hereditaments have not hitherto been assigned or encumbered; And that the said [*vendor*] hath power hereby to assign the said hereditaments and premises in manner aforesaid, and according to the intent hereof;

—for quiet enjoyment;

And that the same shall henceforth during the said term be held and enjoyed accordingly, free from all incumbrances;

—for further assurance;

And shall from time to time, and at any time or times hereafter, upon every request and at the costs of the said [*purchaser*], his executors, administrators, or assigns, be further and more effectually or satisfactorily assigned to him or them, or as he or they shall direct, for the residue of the said term, by such acts, deeds, or other assurances as he or they shall reasonably require, and tender to be done, executed, or made;

—for production of deeds, &c.

And also, (unless inevitable accident shall prevent), that the writings specified in the schedule hereunder written shall, from time to time, and at any time or times during the said term, be produced to the said [*purchaser*], his executors, administrators, or assigns, or his or their nominees, or at any judicial investigation, at his or their request; And that attested or other copies of, or extracts from all or any of the said writings shall, from time to time, or at any time or times during the said term, be delivered to the said [*purchaser*], his executors, administrators, or assigns, at his or their request and costs.

Purchaser cove-

AND the said [*purchaser*],

Use of the habendum.

(*b*) [The habendum is useless in the majority of deeds, and is not essential in any. It is convenient where there are several conveying parties and subjects of conveyance, because it enables the draughtsman to give a clear résumé of the effect intended to be produced.]

for himself, his heirs, executors, administrators, and assigns, covenants with the said [*vendor*], his heirs, executors, and administrators, that the said [*purchaser*], his executors, administrators, or assigns, will or shall, henceforth during the residue of the said term, pay and perform the rents and covenants respectively reserved by and contained in the said indenture of lease on the lessee's part to be paid and performed, and indemnify the said [*vendor*], his heirs, executors, and administrators, from the consequences of any non-payment or non-performance thereof respectively. In witness &c.]

67. ASSIGNMENT OF LEASEHOLDS: COVENANT TO PRODUCE DEEDS. (SHORT FORM).

nants to pay rents and perform covenants.

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68. ASSIGNMENT *of the* EQUITY *of* REDEMPTION *of a Leasehold House to the* MORTGAGEE *by* INDORSEMENT *on the* MORTGAGE-DEED (*a*).

68. ASSIGNMENT OF EQUITY OF REDEMPTION BY INDORSEMENT

THIS INDENTURE, made the —— day of ——, Between the within-named [*vendor*], of the one part, and the within-named [*purchaser*], of the other part. Whereas the within-mentioned principal sum of 500*l.* is still owing to the said [*purchaser*], under or by virtue of the within-written indenture, with the sum of 25*l.* for interest thereon to the date hereof, making together the sum of 525*l.* And whereas the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the within-mentioned piece or parcel of ground, messuage or tenement, with the appurtenances, discharged from all equity of redemption by reason of the proviso or agreement for that purpose contained in the within-written indenture, or otherwise howsoever, in consideration as well of the said sum of 525*l.*, now due and owing for principal and interest as aforesaid, as of the further sum of 315*l.*, paid by the said [*purchaser*] to the said [*vendor*], as hereinafter mentioned, which two several sums of 525*l.* and 315*l.* make together the sum of

Parties.

Recital of principal and interest due;

—contract for purchase.

(*a*) It is convenient to indorse the assignment of the equity of redemption on the mortgage-deed, because it prevents the possibility of any use being made of the covenant in the mortgage-deed for payment of the money, that deed being retained by the mortgagee as part of his evidence of title. If the mortgage-money were also secured by bond, the bond of course would be cancelled or delivered up.

Convenience of taking the assignment of equity of redemption by indorsement.

68. ASSIGNMENT OF EQUITY OF REDEMPTION BY INDORSEMENT.

Testatum.

In consideration of money due on mortgage, and of further sum paid, vendor assigns to purchaser,

840*l.* (*b*). NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the said sum of 525*l.*, so due and owing by or from the said [*vendor*] to the said [*purchaser*], for principal and interest as aforesaid, and of and from which sum of 525*l.*, and all claims and demands on account of the same (*c*), he the said [*purchaser*] doth hereby acquit, release, and discharge the said [*vendor*], his heirs, executors, administrators, and assigns; and also in consideration of the sum of 315*l.* sterling, paid by the said [*purchaser*] to the said [*vendor*], immediately before the execution of these presents, the receipt of which last-mentioned sum the said [*vendor*] doth hereby acknowledge, and of and from the same doth hereby acquit &c.; (the said two several sums of 525*l.* and 315*l.* making together the said sum of 840*l.*, being in full for the absolute purchase of the said piece or parcel of ground, messuage or tenement, with the appurtenances, for the residue now unexpired of the within-mentioned term of fifty-eight years, freed and discharged as aforesaid); He the said [*vendor*] *Doth*, by these presents, grant, bargain, sell, assign, and confirm unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT the within-mentioned piece or parcel of ground, with the messuage or tenement thereon erected and built, and all other the premises within mentioned, and particularly described in the within-in-part-recited indenture of lease, with their and every of their appurtenances, (except as therein mentioned); And all the estate, right, title, interest, trust, possession, equity and power of redemption, right, benefit, property, claim, and demand whatsoever, both at law and in equity, of him the said [*vendor*], of, in, and to the same premises, with their appurtenances; together with the said indenture of lease, and all

parcels, by reference to within indenture;

and all the estate, &c.

Stamp.

(*b*) This is the sum on which the ad valorem duty must be paid.

Mortgagor should be discharged from absolute covenants of mortgage.

(*c*) It is evident that the mortgagor ought to be discharged not only from the payment of the monies due on the mortgage, but from the absolute covenants for title, &c. entered into by him in the mortgage-deed; probably the words in the text, coupled with the substituted limited covenants contained in the present deed would have that effect. If it be thought advisable to extend the discharge *expressly* to these, say—"and of and from all other claims and demands whatsoever, by virtue or in respect of any covenant, clause, matter, or thing contained in the within-written indenture."

benefit and advantage thereof, and of the lessor's covenants and agreements therein contained. To HAVE AND TO HOLD the said piece or parcel of ground, messuage or tenement, and all and singular other the premises demised by the said indenture of lease, and by the within-written indenture assigned or intended so to be, with the appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, henceforth during all the residue now unexpired of the said term of fifty-eight years, granted by the said indenture of lease, and for all other the estate, term, and interest of the said [*vendor*] therein, absolutely discharged from the proviso or agreement for redemption contained in the said indenture of assignment, and from all benefit and equity of redemption by reason thereof, or otherwise howsoever; But subject nevertheless to the payment of the rent, rates, taxes, and assessments, which, from and after the —— day of —— last past, are and ought to be paid, and to the observance and performance of the covenants, conditions, and agreements which henceforth, under or by virtue of the within-mentioned indenture of lease, are and ought to be observed and performed on the part of the said [*vendor*], his heirs, executors, administrators, and assigns. (*Declaration against merger of debt, ut ante, p.* 226; *covenants for title by the vendor, ut ante, p.* 169; *also covenant by the purchaser to pay the rent and perform the covenants of the lease, ut ante, p.* 171). IN WITNESS &c.

68. ASSIGNMENT OF EQUITY OF REDEMPTION BY INDORSEMENT.

Habendum to purchaser;

discharged from the proviso for redemption, but subject to the rents, &c. of lease.

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69. [CONVEYANCE *of* FREEHOLDS *to a* PURCHASER, *who* COVENANTS NOT TO ERECT BUILDINGS *of a* CERTAIN DESCRIPTION. *The Property being in Lease with other Property, the* LESSEE SURRENDERS *the* PART *now sold, in consideration of the* RENT *being apportioned.* RESERVATION *of a* RIGHT *of* WAY *and the* USE OF A YARD *to the Vendor, his Heirs and Assigns,* OCCUPIERS OF AN ADJOINING CLOSE. (*A concise Form.*)

69. FREEHOLDS: RESERVATION OF RIGHT OF WAY: COVENANT NOT TO BUILD: SURRENDER BY LESSEE.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; [*lessee*], of &c., of the second part; and [*purchaser*], of &c., of the third part. WHEREAS (*recite the vendor's title.*) AND WHEREAS, by an

Parties.

Recital of lease;

69. FREEHOLDS: RESERVATION OF RIGHT OF WAY: COVENANT NOT TO BUILD: SURRENDER BY LESSEE.

indenture of lease, dated &c., and made between the said [*vendor*], of the one part, and the said [*lessee*], of the other part, the hereditaments hereinafter described were, with other hereditaments, demised to the said [*lessee*] for the term of fourteen years from Lady Day 18—, at the yearly rent of £——. And whereas the said [*purchaser*] hath contracted with the said [*vendor*] for the purchase of the hereditaments hereinafter described for the price of £——, and the said [*lessee*] hath agreed to surrender the same unto the said [*purchaser*] in consideration that the said [*vendor*], for himself, his heirs, executors, administrators, and assigns, agrees to accept an apportioned rent of £—— per annum for and in respect of the residue of the said hereditaments comprehended in the said demise, in lieu of the said rent of £——,

—contract for sale;

—that lessor has agreed to surrender the lands now sold on having rents apportioned.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreements, and in consideration of the sum of £—— by the said [*purchaser*] to the said [*vendor*] already paid, the said [*vendor*] Doth, by these presents, made &c., (*ut ante, p.* 72), grant, bargain, sell, release, and confirm unto the [*purchaser*] and his heirs All that &c., (*parcels*), Which hereditaments and premises are delineated in the map or plan hereupon indorsed, and therein distinguished by a red tint or colour: Together with all and every the rights, profits, members, and appurtenances to the same hereditaments and premises now or heretofore in fact or in reputation belonging or appertaining; And all the estate, right, title, property, possession, claim, and demand whatsoever, both at law and in equity, of him the said [*vendor*] in, to, of, or upon the same hereditaments and premises, or any part thereof; *Reserving nevertheless* to and for the said [*vendor*], his heirs and assigns, and his and their tenants, under-tenants, bailiffs, and agents, occupiers for the time being of a certain messuage or tenement and hereditaments now in the occupation of [A. B.] and lying and being &c., (which last-mentioned messuage or tenement and hereditaments are delineated in the said map or plan hereupon indorsed, and are therein distinguished by a blue tint or colour), and his and their agents, servants, and workpeople, and all other persons going to or from the last-mentioned messuage or tenement and hereditaments, or any part thereof, full, free, absolute, and perpetual right of roadway and passage from the high-road or street in —— aforesaid, across, through, and over the said close or yard, lying on the west side of the said messuage intended to be hereby

Vendor releases parcels.

Reservation of right of way.

released, and every part thereof, to all and every or any part of the said messuage or tenement and hereditaments distinguished in the said map or plan by a blue tint or colour, in whatever state or condition the last-mentioned messuage or tenement and hereditaments may be, and to whatever use or purpose the same, or any part thereof, or any erection or building to be made thereon, may be put, and for all and every or any purposes or purpose whatsoever; And also the use of the said close or yard in common with the said [*purchaser*], his appointees, heirs, and assigns, and his and their tenants and under-tenants; it being the intent and meaning of the said parties hereto, that the whole of the said close or yard shall henceforth for ever lie open and undivided as the same now is, without any building or impediment to be erected thereon, and that the same shall be used in common by the occupiers of the said several messuages or tenements and hereditaments hereinbefore mentioned, and distinguished in the said map or plan by the respective tints or colours aforesaid (*a*). To HOLD the same hereditaments and premises (subject to the reservation aforesaid) unto the said [*purchaser*] and his heirs for ever, To SUCH USES as the said [*purchaser*] shall, by any deed or deeds, or by will, appoint; and subject thereto, To THE USE of the said [*purchaser*] and his assigns during his life; with remainder to the use of the said [*vendor*] (*b*), his executors, administrators, and assigns, during the life of the said [*purchaser*], in trust for the said [*purchaser*] and his assigns; with remainder to the use of the said [*purchaser*], his heirs and assigns, for ever. AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said agreement, and in consideration of the premises, the said [*lessee*] doth hereby surrender and yield (*c*) up unto the said [*purchaser*] and his heirs, ALL

69. FREEHOLDS: RESERVATION OF RIGHT OF WAY: COVENANT NOT TO BUILD: SURRENDER BY LESSEE.

and use of yard.

Habendum to uses to prevent dower.

Further testatum.

Lessee surrenders the premises now sold to the vendor.

(*a*) [As to rights of way, vide ante, Vol. 4, pp. 148, 669, 689; *Allan* v. *Gomme*, 3 Per. & D. 581; 11 Ad. & E. 760.]

(*b*) [It is sometimes convenient to name the vendor as dower-trustee.]

(*c*) [This surrender might have been incorporated in the same operative part with the release by the vendor, the reversion being in the purchaser under the supposed lease for a year. Indeed the conveyance might have been made by grant of the reversion and surrender of the term, or by assignment of the term and release of the reversion, without any lease-for-a-year stamp. Vide ante, p. 205. The courts, in modern times, have shewn every disposition to construe deeds so as to give effect,

The same operative part may operate doubly, so as to pass two distinct estates in the subject-matter.

69. FREEHOLDS: RESERVATION OF RIGHT OF WAY: COVENANT NOT TO BUILD: SURRENDER BY LESSEE.

AND SINGULAR the hereditaments and premises hereinbefore described and intended to be hereby assured; and all the estate, right, title, property, possession, claim, and demand whatsoever, both at law and in equity, of him the said [*lessee*], in, of, or upon the same hereditaments and premises, or any part thereof, to the intent that the residue now unexpired of the said term of fourteen years, and all other the estate, term, and interest of the said [*lessee*] in the same hereditaments and premises, (but not in any other of the said hereditaments so demised as aforesaid, and not intended to be hereby assured), may be merged and extinguished in the reversion of the same hereditaments and premises. (*Covenants for title, &c., by vendor, ut ante, p.* 198). AND the said [*lessee*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant with the said [*purchaser*] and his heirs, that he the said [*lessee*] hath not committed or suffered any act or default by means whereof the said hereditaments and premises, or any part thereof, are, is, can, shall, or may be aliened, charged, or encumbered, in any manner howsoever; And that he the said [*lessee*], and all persons lawfully or equitably claiming under him, will and shall, upon every reasonable request of the said [*purchaser*], his appointees, heirs, or assigns, and at his or their costs, do and execute every such act, deed, or assurance for the more effectually surrendering or assuring the said hereditaments unto the said [*purchaser*], his appointees, heirs, or assigns, or otherwise, as he or they shall require. AND the said [*purchaser*], for himself, his heirs, and assigns, doth hereby covenant with the said [*vendor*] and his heirs, that, notwithstand-

Covenant by lessee against incumbrances, and for further assurance.

Purchaser covenants for enjoyment of right of way;

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if possible, to the obvious intention. Thus, where L., the owner of the fee, demised a messuage for years, and the lessee made an under-lease, and afterwards demised his reversion to L. for a term commensurate with that granted by the under-lease, (vide ante, p. 84), and L. subsequently executed a lease and release to A., by the latter of which he granted, bargained, sold, aliened, released, and confirmed to A. the messuage, together with all appurtenances, and the reversion, &c., and all the estate, &c.; it was held, that the chattel reversion for years, as well as the fee-simple, passed. "The general rule is," said Tindal, C. J., "that deeds are to be construed, if possible, so as to effectuate the intention of the parties, and no authority has been brought before us to shew, that, where a double purpose is intended, and the words are large enough, such double purpose may not be carried into effect." *Burton* v. *Barclay*, 5 Moo. & P. 785.]

ing any act, deed, or default of or by the said [*purchaser*], his appointees, heirs, or assigns, or of or by any person or persons claiming or to claim by, through, or under them or any of them, the right of way and the use of the said yard hereinbefore reserved shall henceforth, from time to time and at all times for ever, be used and enjoyed by the several persons, and in manner aforesaid, according to the true intent and meaning of these presents, without any lawful hindrance or disturbance whatsoever; *And also*, that he, the said [*purchaser*], will not, nor shall his appointees, heirs, or assigns, or any person or persons lawfully or equitably claiming by, through, under, or in trust for him or them, at any time or times henceforth, (before the expiration of twenty-one years from the death of the survivor of the several persons now living, upon whose respective lives there is or are now subsisting any policy or policies of insurance effected with the Equitable Life Insurance Company in London (*d*)), build, or erect, or permit or suffer to be built or erected, or to remain or be upon the said hereditaments and premises intended to be hereby assured, or any part thereof, any house, building, or erection intended or used for the purpose of residence having less than two habitable floors or stories, that is to say, one floor or story not lower than the level of the surrounding ground, and one story above the last-mentioned floor or story, or any house, building, or erection intended or used for the purpose of residence that shall not be well and properly and completely roofed and covered with slates, tiles, or metal. AND IT IS HEREBY DECLARED AND AGREED, that, in case of any breach of the covenant lastly hereinbefore contained, it shall be lawful for the said [*vendor*] or his heirs, thereupon or at any time thereafter, in, to, or upon the said hereditaments and premises, or any part thereof in the name of the whole, to re-enter, and the same to re-possess and enjoy, as and for his and their former estate, for his and their own use and benefit. AND IT IS HEREBY LASTLY DECLARED, covenanted, and agreed, by and between the said [*lessee*] and [*vendor*], for themselves respectively, and their

69. FREEHOLDS: RESERVATION OF RIGHT OF WAY: COVENANT NOT TO BUILD: SURRENDER BY LESSEE.

and not to build houses of less than two stories, &c.

Power of re-entry on breach of covenant.

Mutual covenants between vendor and lessee, that lease

(*d*) [The reader will perceive that this restriction is inserted, in order to exclude any objection founded on the rule against perpetuities. The better opinion is, that unlimited covenants of this nature are not obnoxious to that rule; but the legality of a power of re-entry on breach of covenant, unrestricted in point of time, is more questionable. Vide ante, pp. 343, 349.]

As to unlimited covenant not to build, &c.

69. FREEHOLDS: RESERVATION OF RIGHT OF WAY: COVENANT NOT TO BUILD: SURRENDER BY LESSEE.

respective heirs, executors, administrators, and assigns, that, for and notwithstanding anything hereinbefore contained to the contrary, the said indenture of lease, and every clause, reservation, covenant, and condition therein contained are, is, and shall be henceforth valid, effectual, and subsisting, to all intents and purposes, except so far as relates to the said hereditaments and premises hereinbefore devised and intended to be hereby assured; save and except also, that the said annual rent of £——, by the said indenture reserved, shall henceforth during the said term be, and the same is, hereby reduced to the annual sum or rent of £——, being the apportioned rent to be henceforth paid in respect of the hereditaments not included in the assurance (*e*). IN WITNESS &c.]

shall subsist, as to the unsold premises, at a rent of £——.

(*e*) [In strictness, this agreement should be by a separate deed, to be delivered to the lessee. The vendor, however, would be bound to produce this deed, both at law and in equity. Vide ante, p. 94. Indeed, a covenant might be entered into with the lessee for its production. The present deed will require no stamp beyond the ad valorem stamp on the purchase-money, and the lease-for-a-year stamp.]

70. UNDER DECREE IN CHANCERY.

70. RELEASE *in Fee of* FREEHOLD LANDS, *and* COVENANT *to* SURRENDER COPYHOLD LANDS *by the* HEIR-AT-LAW *of the Surviving* TRUSTEE *of a* WILL, *in pursuance of a* DECREE *of the* COURT *of* CHANCERY *establishing such Will.*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part. WHEREAS [*testator*], late of ——,

Recital that testator was seised in fee of the freeholds and

deceased, being seised of or well entitled to the inheritance in fee-simple in possession of and in the freehold hereditaments hereinafter described, and intended to be hereby released, and also of and in the copyhold or customary hereditaments hereinafter mentioned and described, and covenanted to be surrendered, according to the custom of the manor of [A.], in the county of [B.], by his last will and testament, bearing date on or about the —— day of ——,

copyholds according to the custom of the manor;

and by his will devised all his real estate to trustees,

and executed and attested in such manner as was then by law required for passing freehold estates, gave and devised all his freehold and copyhold estates unto [C.], [D.], and

70. UNDER DECREE IN CHANCERY.

[E.], of ——, their heirs and assigns, *To the use* of his said wife for her life, And after her decease *Upon trust* to sell and dispose of the said freehold and copyhold estates, and pay and apply the money arising by sale thereof to such person and persons, and in such manner, as is thereinafter directed and concerns the same. And the said testator soon afterwards departed this life, without revoking or altering his said will, leaving his said wife [*wife*] him surviving. AND WHEREAS the said [C.] departed this life on the —— day of ——. And the said [E.] departed this life on the —— day of ——, leaving the said [D.] him surviving. AND WHEREAS the said [D.] departed this life on the —— day of ——, leaving the said [*vendor*] his only son and heir-at-law, and customary heir, whereby the freehold and copyhold estates, so devised as aforesaid by the said will of the said [*testator*], have descended to and are now become vested in the said [*vendor*], upon the trusts in the said will of the said [*testator*] declared concerning the same. AND WHEREAS, at a special customary court holden for the said manor of ——, on or about the —— day of ——, the said [*vendor*] was duly admitted tenant by the steward of the said manor, and seisin was granted to him by the rod, according to the custom of the said manor, of the copyhold hereditaments hereinafter described and covenanted to be surrendered, with their appurtenances; *To hold* the same unto and to the use of the said [*vendor*], his heirs and assigns, for ever, Upon the trusts nevertheless expressed and declared in the said will of the said [*testator*], or such or so many of them as were then existing or capable of taking effect, at the will of the lord and according to the custom of the said manor, at and under the rents and services therefore due and of right accustomed. AND WHEREAS, by a decree or decretal order of the High Court of Chancery, made by his Honor the Vice-Chancellor of England, on or about the —— day of ——, in a cause wherein [R. S.], (as cousin and heir-at-law of the said [*testator*], deceased), [S. S.] (son of the said [R. S.]), and [*infants*], infants, by the said [R. S.], their grandfather and next friend, were plaintiffs, and [*several other persons*], and the said [*vendor*] (therein described as only son and heir-at-law of the said [*surviving trustee*]), were defendants, It was (amongst other things) ordered and directed, that it should be referred to Master ——, to inquire whether the plaintiff [R. S.], the elder, was the heir-at-law

to the use of his wife for life, and, at her decease, in trust, to sell the same, and apply the money as thereinafter directed;

—that trust estates had become vested in the heir of the surviving trustee.

—that, at a special court held for the said manor, heir was admitted tenant,

to hold to his use, &c., for ever, upon the trusts of the said will.

—of decree of the Court of Chancery;

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of the said [*testator*]; and in case the said Master should find that he was, (the said plaintiff by his counsel admitting the due execution of the will of the said [*testator*]), the Court declared that the same ought to be established, and the trusts thereof performed and carried into execution, and ordered and decreed the same accordingly. And it was ordered and decreed, that the said [*testator's*] freehold and copyhold estates then remaining unsold should be sold, either entire or in parcels, with the approbation of the said Master, to the best purchaser or purchasers that could be got for the same, to be allowed of by the said Master; whereupon all proper parties were to join and to produce before the said Master upon oath, all deeds and writings in their custody and power relating thereto, as the said Master should direct. And it was ordered that the money to arise by such sale should be paid into the Bank, with the privity of the Accountant-General of the said Court, to be there placed to the credit of the said cause. AND WHEREAS, soon after the making of the said decree or order, and before any further proceedings were had in the said cause, it being discovered that the said [R. S.] was not the sole heir-at-law of the said [*testator*], but that [T. M.] and [L. O.] were co-heirs with him, being the descendants of [Ann R.] and [Mary B.], the [*testator's*] cousins, who were living at the time of his death, and against whom his will had been proved per testes, soon after his death, by the said [*widow*], his widow, the said plaintiffs filed a supplemental bill, and made the said [T. M.] and [L. O.] defendants to the said suit. AND WHEREAS, by another decree or decretal order of the said Court of Chancery, made on or about the —— day of ——, on the hearing of the said cause on the supplemental bill, the will of the said [*testator*], deceased, was declared to be well proved, and it was ordered and decreed, that the trusts thereof should be performed and carried into execution. And it was further ordered, that the said decree of the —— day of —— should be carried into execution, and the accounts thereby directed carried on and prosecuted between the then parties to the said suit, in like manner as the same were directed against the former parties. AND WHEREAS the said Master, by his report of the —— day of ——, certified (amongst other things) that, in pursuance of the said decree of the —— day of ——, he caused the sale of the freehold and copyhold estates of the said [*testator*] to be duly advertised in the

—direction that the testator's estates should be sold,

and that all the deeds relating thereto should be produced,

and the money arising from sale should be paid into the Bank of England to the credit of the cause;

—that R. S. was not the sole heir-at-law of the testator,

but that T. M. and L. O. were co-heirs with him;

—supplemental bill;

—decree in supplemental cause;

—Master's report of sale,

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London Gazette, in six distinct lots, according to the particular thereof set forth, and had on that day (being the peremptory day appointed for such sale) been attended by several bidders (*a*), and that the said [*purchaser*] had proposed before him to give the sum of 2500*l.* for the purchase of so much of the freehold hereditaments hereinafter mentioned and described, and intended to be hereby released, as is not comprised in the indenture of lease hereinafter mentioned to bear date the third day of August, 1792, (being that part of the estates of the said testator which was intitled or comprised in lot No. 1), and to give the sum of 1000*l.* for the purchase of so much of the said freehold hereditaments hereinafter mentioned and intended to be hereby released as is comprised in the said indenture of lease of the third day of August, 1792, and of the copyhold or customary hereditaments hereinafter described and covenanted to be surrendered, (being that part of the estates of the said [*testator*] which was intitled or comprised in lot No. 3), on the terms of having a good title made thereto respectively, free from incumbrances; which sums of 2500*l.* and 1000*l.*, making together the sum of 3500*l.*, being the most money that had been bidden before him for the premises comprised respectively in the said lots, No. 1 and No. 3, he the said Master did allow the said [*purchaser*] to be the best purchaser thereof, at those prices, upon the terms of his biddings. AND WHEREAS, by another order of the said Court of Chancery, made in the said cause of the —— day of ——, It was ordered, that the said report should be confirmed, unless the said plaintiffs and defendants, or their respective clerks in court, having notice thereof, should, within —— days after such notice, shew good cause to the contrary; which last-mentioned order was made absolute by a subsequent order of the said Court, made in the said cause on the —— day of ——. And by another order of the said Court, made in the said cause on the —— day of ——, It was (amongst other things) ordered, that the said [*purchaser*] should, within —— weeks, pay the said two sums of 2500*l.* and 1000*l.*, making together the sum of 3500*l.*, purchase-money, into the Bank of England, with the privity

and of the purchase by the present purchaser;

—confirmation of report;

—purchaser to pay the purchase-money into the Bank of England,

(*a*) By the 75th Order, (2 Russ., App. 25), the Master may direct estates to be sold in the country, "at such place and by such person as he shall think fit." Sale in the country.

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and thereupon to be let into possession and have a conveyance.

of the Accountant-General of the said Court, to be placed to the credit of the said cause; And that thereupon he should be let into the possession of the said premises so purchased by him, and receive the rents and profits thereof from the —— day of —— then last past. And that, on such payment by the said [*purchaser*], a proper conveyance of the same freehold and copyhold hereditaments and premises should be made and executed to him and his heirs, or as he should direct, such conveyance to be settled by the said Master in case the parties differed about the same (*b*).

—that purchaser paid the purchase-money into the Bank of England.

AND WHEREAS the said [*purchaser*] did, on the —— day of —— now last past, pursuant to the last-mentioned order, pay the said two sums of 2500*l.* and 1000*l.*, making together the sum of 3500*l.*, into the Bank of England, in the name and with the privity of the Accountant-General of the said Court of Chancery, to the credit of the said cause, [as appears by the receipt of [*cashier*], one of the cashiers of the said bank, dated the said —— day of ——, and the certificate of the said Accountant-General thereto annexed, and therewith filed in the office of the Registrars of the said Court(*c*).]

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of and in obedience to the said decrees and subsequent orders, and in consideration of the sum of 2900*l.*, part of the said sum of 3500*l.* so as aforesaid paid by the said [*purchaser*] into the Bank of England, in the name and with the privity of the Accountant-General of the said Court of Chancery, and there placed to the credit of the said cause, in full for the absolute purchase of the inheritance in fee-simple of and in the said freehold hereditaments hereinbefore mentioned and intended to be hereby released, and of the said copyhold or customary hereditaments hereinafter covenanted to be surrendered; (which sum of 2900*l.*, being the apportioned price or consideration for the said freehold hereditaments, he the said [*vendor*] doth hereby acknowledge to be in full payment and discharge of the purchase of the same freehold hereditaments, and of and from the same doth release and discharge the said [*purchaser*], his

In consideration of payment of purchase-money into the Bank of England,

(*b*) Here it will be perceived, that the Master is only to direct the form of the conveyance in case the parties differ, in which respect it varies from the forms, ante, Vol. 6, pp. 216, 485.

(*c*) [This recital of the evidence of the payment of the purchase-money is quite superfluous.]

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heirs, executors, administrators, and assigns); And also in consideration of the sum of 10*s.* paid by the said [*purchaser*] to the said [*vendor*], at or before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged), He the said [*vendor*] *Doth*, by these presents, made &c., (*ut ante, p.* 72), bargain, sell, and release, unto the said [*purchaser*] and his heirs, All &c., (*parcels and general words*), And all deeds, &c., To HAVE AND TO HOLD the said messuage or tenement, close, pieces or parcels of lands, hereditaments, and all and singular other the premises hereinbefore mentioned and intended to be hereby released, unto the said [*purchaser*] and his heirs, To THE ONLY PROPER USE and behoof of the said [*purchaser*], his heirs and assigns, for ever, (subject, nevertheless, as to the said forty rods thereof hereinbefore particularly mentioned and described, being part and parcel of the said hereditaments and premises hereinbefore mentioned and intended to be hereby released, to a lease thereof granted by indenture, bearing date &c., and made &c., whereby the said [*testator*] demised the said forty rods of land, together with the copyhold or customary hereditaments hereinafter covenanted to be surrendered, unto the said [L. T.], his executors, administrators, and assigns, from Christmas then next ensuing, for the term of ninety-nine years, under the yearly rent of 44*l.*) AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of, and in obedience to, the said decrees and subsequent orders, and in consideration of the sum of 600*l.*, being the residue of the said sum of 3500*l.* so as aforesaid paid, &c., (*ut supra, p.* 472), being the apportioned price or consideration for the said copyhold hereditaments, He the said [*vendor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree, &c. (*to surrender copyholds, ut ante, p.* 191, *and covenant by vendor that he has not encumbered*). IN WITNESS &c.

vendor releases to purchaser.

Habendum.

To the use of purchaser in fee,

(subject to lease of part).

Further testatum.

71. PURCHASE BY TRUSTEES OF SETTLEMENT.

71. [CONVEYANCE *of Freeholds, under a* DECREE *of the* COURT *of* CHANCERY, TO *the* TRUSTEES *of a* MARRIAGE SETTLEMENT, *who, with the Consent of the Tenant for Life, who is also the Vendor, and his Wife, purchase with Monies arising from the Sale of settled Estates. A* MORTGAGEE *joins on being* PAID OFF.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor, tenant for life*], of &c., and [*wife*], his wife, of the first part; [*mortgagee*], of &c., of the second part; and [*trustees*], of &c., of the third part. WHEREAS, by an indenture of bargain and sale, bearing date the —— day of ——, [duly inrolled in her Majesty's Court of Common Pleas at Westminster,] and expressed to be made between &c., and by five common recoveries, duly suffered in pursuance thereof, in Hilary Term 18—, in which recoveries the said —— was demandant, the said —— tenant, and the said [*vendor*] vouchee, divers hereditaments, in the several counties of [*five counties*], were assured and limited to the uses, and in the manner in the said indenture of bargain and sale and in part hereinafter mentioned, that is to say, (amongst and together with other hereditaments), all the hereditaments hereinafter particularly mentioned were assured and limited *To such uses*, upon such trusts, and to and for such intents and purposes, and under and subject to such powers, provisoes, limitations, declarations, and agreements, as the said [*vendor*], by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by him sealed and delivered, in the presence of and attested by two or more credible witnesses, or by his last will and testament, should direct, limit, or appoint; And in default of and until such direction, limitation, and appointment, and subject thereto, *To the use* of the said [*vendor*], and the heirs male of his body, with divers remainders over. AND WHEREAS, by indentures of lease, and appointment and release, bearing date respectively &c.; The indenture of appointment and release being expressed to be made between &c., (being the settlement executed previously to the marriage then intended to be and soon afterwards solemnized between the

Recital of bargain and sale and recoveries, whereby both the settled hereditaments and the hereditaments now purchased were limited

to such uses as vendor should appoint; and, subject thereto,

to the use of vendor in tail, &c.

—of marriage settlement of part of the said hereditaments,

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said [*vendor*] and the said [*wife*], his wife), divers hereditaments, being part of the hereditaments comprised in the hereinbefore-recited indenture of bargain and sale and recoveries, were, in pursuance of the said power for that purpose given or reserved as aforesaid, appointed, and by way of further assurance released by the said [*vendor*], *To the use of* the said [*trustees of term*], their executors, administrators, and assigns, for the term of ninety-nine years, upon the trusts therein mentioned, with remainder *To the use* of the said [*vendor*] and his assigns for his life, with the usual limitation to preserve contingent remainders; with remainder *To the uses* and intent, that, if the said [*vendor*] should die in the lifetime of the said [*wife*], she, the said [*wife*], and her assigns, should receive during her life a yearly rent of £——, in manner and with the remedies therein mentioned; and, subject to the said yearly rent and the remedies for the recovery thereof, *To the use* of the said [*trustees*], their executors, administrators, and assigns, for the term of 1000 years, upon the trusts therein mentioned; with remainder *To the use* of the first and every other son of the said [*vendor*] by the said [*wife*], successively, in tail male; with remainder *To the use* of such persons, and in such manner as the said [*vendor*], by any deed or will, should appoint; and, subject thereto, *To the use* of the same persons, and in the same manner, to and in which the same hereditaments then stood limited and settled, in default of appointment by the said [*vendor*], under or by virtue of the above-recited indenture of bargain and sale and recoveries. And in the now-reciting indenture of appointment and release is contained a power, enabling the said [*trustees*], and the survivor of them, and the heirs of such survivor, by and with the consent and approbation of the said [*vendor*] and [*wife*], his wife, to be signified in writing, sealed and delivered by them, and attested by two or more credible witnesses, to sell and dispose of, in the manner therein prescribed, all or any part or parts of the said hereditaments thereinbefore appointed and released. And it was, by the same indenture of appointment and release, further declared, that, when any part of the said hereditaments should be sold, the said [*trustees*], and the survivor of them, and the executors and administrators of such survivor, should receive, and with all convenient speed lay out and invest the monies arising by such sale or sales, with such consent and approbation, and so signed as aforesaid, in the purchase of

to trustees, for ninety-nine years;

remainder to vendor for life;

remainder to trustees to preserve;

remainder to use that wife should receive a rent-charge;

remainder to the use of trustees for 1000 years;

remainder to the use of the first and other sons of the marriage;

remainder to such uses as vendor should appoint;

and, subject thereto, to the uses limited in first recited indenture, in default of appointment;

—power of sale;

—power to purchase other lands to be settled to the same uses;

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other hereditaments in fee-simple in possession, to be situate in England. And that the said [*trustees*], and the survivor of them, and the heirs, executors, or administrators of such survivor, should settle and assure, or cause to be settled and assured, the hereditaments so to be purchased, *To such and the same uses*, upon such and the same trusts, to and for such and the same intents and purposes, and with, under, and subject to such and the same powers, provisoes, conditions, and agreements as were, in and by the now-reciting indenture of appointment and release, limited and declared of and concerning the hereditaments which should be so sold as aforesaid, or as near thereto as the deaths of parties and other intervening accidents would then admit of; AND WHEREAS, (*recite mortgage of purchased land, ut ante, p.* 204).

—sale by order of court;

AND WHEREAS, under or by virtue of a decree or decretal order, made on the —— day of ——, in a cause in the High Court of Chancery, in which, &c., (*ut ante, p.* 469), and of several orders subsequently made in the said cause, divers hereditaments in the parishes of ——, &c., in the county of ——, being part of the hereditaments comprised in the above-recited indenture of appointment and release of the —— day of ——, were, by the said [*trustees*], with the consent and approbation of the said [*vendor*] and [*wife*], his wife, duly given and testified in manner aforesaid, sold and disposed of, and the monies arising from the sale thereof were, with the privity of the Accountant-General of the said Court, paid into the Bank of England to the credit of the said cause.

—of contract with vendor for purchase of unsettled lands;

AND WHEREAS, in pursuance of the above-recited direction in this behalf contained in the last-mentioned indenture, the said [*trustees*] having, with the consent and approbation of the said [*vendor*] and [*wife*], his wife, (signified as hereinafter is mentioned), contracted and agreed with the said [*vendor*] for the absolute purchase of the hereditaments hereinafter described, and intended to be hereby appointed and released, or otherwise assured, and the inheritance thereof in fee-simple in possession, free from all incumbrances, at or for the price or sum of £—— (*a*), It was, by an order made

—of order referring such

(*a*) [Where the purchase is not made under the sanction of the Court, it is usual to have the property valued by a surveyor, and to state that fact in the conveyance, thus:—

Recital of valuation.

"At or for the price or sum of £——, being the value fixed

71. PURCHASE BY TRUSTEES OF SETTLEMENT.

in the said cause on the —— day of ——, after stating the last-mentioned agreement, ordered that it should be referred to Master ——, to whom the said cause stood referred, whether the said hereditaments hereinafter described were a fit and proper estate, and of sufficient value, to be purchased out of the said trust-monies and funds in the said cause, to the uses of the above-recited indenture of release and appointment of the —— day of ——, at the price of £——. And if the said Master should find the said hereditaments to be a proper purchase, and of sufficient value to be so purchased, then that he should inquire whether a good title could be made thereto, free from all incumbrances. And whereas the said Master, by his report, made in pursuance of the said order, and bearing date the —— day of ——, certified, that, upon making the said inquiries, and upon consideration of the affidavit of [*surveyor*], land surveyor, of &c., who had then lately surveyed and valued the said hereditaments, he the said Master was of opinion that the said hereditaments were a proper estate and of sufficient value to be purchased out of the said monies, to the uses aforesaid, at the price of £——, and that, upon consideration of the abstracts of the title to the said hereditaments, he was of opinion that a good title could be made thereto, free from incumbrances. And whereas, by an order made in the said cause on the —— day of ——, it was ordered that the above-recited report of the said Master should be confirmed, and that the Master should proceed to settle a proper conveyance or conveyances of the said hereditaments to the said trustees, to the uses and upon the trusts of the said indenture of release and appointment of the —— day of ——. And

contract to approval of the Master;

—of the Master's report and approval;

—of order confirming the report, &c.;

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thereon by [*valuer*], of &c., surveyor, who was appointed by the said [*trustees*] to value the same; and the particulars of the said valuation are annexed by way of schedule to these presents, and in testimony of the accuracy of the said schedule, the said [*valuer*] has signed the same. And whereas it is intended that the said purchase-money or sum of £—— should be paid with and out of the monies arising by the sale which has been so made of the said settled hereditaments in exercise of such power as aforesaid, and which monies are now in the hands of the said [*trustees*]."

Purchase money to be paid out of produce of settled estates.

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that, upon the execution or executions of the conveyance or conveyances by such parties as the said Master should direct, the sum of £——, part of the said sum of £—— cash, in the bank in the name of the said Accountant-General to the credit of the said cause (*b*), should be paid to the several persons and in the proportions following, (that is to say), &c., and that, for the purposes aforesaid, the said Accountant-General was to draw on the bank in the usual form. AND WHEREAS the said Master hath settled and approved of these presents as a proper conveyance and assurance of the said hereditaments, and hath testified such approval by signing his name in the margin of the last skin hereof. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the above-in-part-recited order; and in consideration of the sum of £——, to be paid in pursuance of the above-recited order to the said several persons and in the proportions aforesaid, in full for the purchase of their respective estates and interests in the said hereditaments; and with the consent and approbation of the said [*vendor*] and [*wife*], his wife, signified by this present deed or writing, sealed and delivered by them in the presence of the two credible persons whose names are intended to be hereupon indorsed as witnesses attesting the sealing and delivery hereof by the said [*vendor*] and [*wife*], his wife; and also by force and virtue and in exercise and execution of the several powers and authorities to him in this behalf respectively given, limited, or reserved by the above-recited indenture of bargain and sale and recoveries, and by the hereinbefore-recited indenture of appointment and release of the —— day of ——, or by either of the said indentures, and of every

—purchase-money to be paid out of produce of settled estates.

—Master's approval of draft.

Testatum.

In consideration of £—— paid to mortgagee,

with the consent of vendor and wife,

(*b*) [If the money is invested in Consols, the order will run thus:—

Direction to sell out stock.

"And that the said Accountant-General should sell so much of the said sum of £—— 3*l.* per Cent. Consolidated Annuities, standing in the name of the said Accountant-General in trust in the said cause, as would be sufficient to raise the sum of £——, (being the said purchase-money or sum of £——, together with the sum of £——, the amount of the ad valorem duty on the conveyance of the said hereditaments). And that the said sum of £——, part of the said sum of £——, should be paid to Mr. ——, clerk to the said Master, to discharge the said ad valorem duty."

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other power or authority in anywise enabling him in this behalf; he the said [*vendor*] DOTH, by this present deed or instrument in writing by him sealed, delivered, and attested as aforesaid, absolutely and irrevocably direct, limit, and appoint that the hereditaments firstly and secondly hereinafter described, with their appurtenances, shall henceforth remain and be to the uses, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisoes, conditions, and agreements hereinafter expressly or by reference limited and declared of and concerning the same.

vendor appoints that the purchased lands shall remain to the uses after declared.

AND THIS INDENTURE FURTHER WITNESSETH, that, for the considerations aforesaid, and in further pursuance of the above-recited order, the said [*mortgagee*], according to his estate and interest therein, and so far as he can or may at law or in equity, but not further or otherwise, at the request, by the direction, and with the consent and approbation of the said [*vendor*] and [*wife*], his wife, (signified as aforesaid), DOTH, by these presents, made &c., (*ut ante, p.* 72), bargain, sell, and release; and the said [*vendor*] DOTH grant, bargain, sell, release, and confirm unto the said [*trustees*] and their heirs, ALL (*parcels and general words*). And all the estate, &c. TO HOLD the said hereditaments and premises unto the said [*trustees*] and their heirs, absolutely freed and for ever discharged of and from the above-recited mortgage security, and all claims and demands on account thereof; TO SUCH AND THE SAME USES, upon such and the same trusts, and for such and the same intents and purposes, and with, under, and subject to such and the same powers, provisoes, declarations, limitations, and agreements, as in the hereinbefore-recited indenture of appointment and release of the —— day of —— are limited, agreed, declared, and expressed of and concerning the said hereditaments thereby appointed and released, which have been so sold by the said [*trustees*] as aforesaid, or as near thereto as the deaths of parties and other intervening accidents will now admit of. (*Covenant by mortgagee against incumbrances, ut ante, p.* 75). AND the said [*vendor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*trustees*], and their heirs, in manner following, (that is to say), *That*, notwithstanding any act, deed, matter, or thing whatsoever, by him the said [*vendor*] made, done, omitted, committed, executed, or knowingly or willingly suffered

Second testatum.

Mortgagee and vendor release and confirm the purchased lands.

Habendum.

To the uses of the settlement.

Covenant by vendor that he and mortgagee have power to convey;

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to the contrary, they the said [*vendor*] and [*mortgagee*] now have in themselves, or one of them now hath in himself, good right, full power, and lawful and absolute authority to appoint and release or otherwise assure the said hereditaments and premises expressed to be hereby appointed, and released or otherwise assured unto the said [*trustees*], and their heirs, To the uses and in the manner aforesaid, according to the true intent and meaning of these presents, *And that* the same hereditaments and premises shall and may from time to time, and at all times hereafter, remain, continue, and be to the uses and in manner aforesaid, according to the true intent and meaning of these presents, and be peaceably and quietly held and enjoyed, and the rents, issues, and profits thereof, and of every part thereof, received and taken accordingly, without any lawful let, suit, trouble, denial, eviction, claim, or demand whatsoever, of or by him the said [*vendor*] or his heirs, or of or by any other person or persons lawfully or equitably claiming or to claim by, from, or under, or in trust for him, them, or any of them; *And that* (*free from incumbrances, and for further assurance to the uses aforesaid, ut ante, p.* 76). IN WITNESS &c.]

—for quiet enjoyment, &c.

72. IN FEE BY INFANT HEIR, OR SUBSTITUTE FOR HEIR OF MORTGAGEE.

72. [RELEASE *in* FEE *by the* INFANT HEIR *of a* MORTGAGEE *on a* SALE, UNDER *an* ORDER *of the* COURT *of* CHANCERY, *by the Executors in pursuance of a Power contained in the Mortgage. Variation where the* HEIR *of the Mortgagee* IS NOT KNOWN.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*heir*], of &c., of the first part; [*executors*], of &c., of the second part; [*mortgagor*], of &c., of the third part; [*purchaser*], of &c., of the fourth part; and [*dower trustee*], of &c., of the fifth part; (*Recite mortgage in fee, with power for the mortgagee, his executors, &c., to sell. Death of mortgagee intestate as to the mortgaged estate, leaving* [*heir*] *his heir; and appointment of executors, and probate, ut ante, Vol.* 6, *p.* 485). AND WHEREAS the said principal sum of £—— remains unpaid, and a considerable arrear of interest is due

Recitals.

— that mortgage-money and interest are due.

thereon. And whereas the said [*executors*], as such executors as aforesaid, in pursuance of the above-recited power of sale contained in the said indenture of mortgage, [and with the assent of the said [*mortgagor*],] have contracted with the said [*purchaser*] for the sale to him of the said hereditaments in fee-simple in possession, at the price of £—— (*a*).

72. IN FEE BY INFANT HEIR, OR SUBSTITUTE FOR HEIR OF MORTGAGEE.
—of sale by executors;

(*a*) [If the heir is not known, say here—

"And whereas the said [*mortgagee*] left no issue, and the said [*executors*] and [*mortgagor*], having been unable, after making diligent inquiry, to discover the heir-at-law of the said [*mortgagee*], did, on the —— day of ——, prefer their petition to the Lord High Chancellor of Great Britain, praying, that it might be referred to one of the Masters of the Court of Chancery, to inquire and certify whether the said [*mortgagee*] was a mortgagee of the said hereditaments within the meaning of an act of Parliament passed in the first year of the reign of King William the Fourth, intituled, 'An Act for amending the laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees, and for enabling courts of equity to give effect to their decrees and orders in certain cases;' and of another act of Parliament passed in the fifth year of the reign of the said king, intituled, 'An Act for amending the law relative to the escheat and forfeiture of real and personal property holden in trust;' and of another act of Parliament passed in the second year of the reign of Queen Victoria, intituled, 'An Act to remove doubts respecting conveyances of estates vested in heirs and devisees of mortgagees,' or of any of the said acts; and if such Master should find that the said [*mortgagee*] was such mortgagee, then whether he was dead without an heir-at-law, or who was his heir-at-law, and whether his heir-at-law could be found; and if such Master should find that the said [*mortgagee*], being such mortgagee, was dead without an heir-at-law, or that it was not known who was his heir-at-law, or that his heir-at-law could not be found, then that the said Master might approve of some proper person to convey the said hereditaments to the said [*executors*], or as they should direct or appoint. And whereas, upon the hearing of the said petition, on the —— day of ——, an order was made, according to the prayer thereof, by his Honor, Vice-Chancellor Sir James Wigram. And whereas

Recital of proceedings in Chancery where heir of mortgagee is not known.

72. IN FEE BY INFANT HEIR, OR SUBSTITUTE FOR HEIR OF MORTGAGEE.

order that infant shall convey.

Testatum.

Heir and executors convey

AND WHEREAS, (*Recite order directing infant to convey, ut ante, Vol. 6, p. 487 (b)*). NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and (so far as concerns the said [*heir*]) in obedience to the above-recited order of the said court, and in consideration of £—— sterling, by the said [*purchaser*], with the assent of the said [*mortgagor*], paid to the said [*executors*], previously to the execution of these presents, the receipt whereof the said

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Samuel Duckworth, Esq., the Master to whom the said matter was referred, duly made his report, dated the —— day of ——, in pursuance of the said order, and thereby found that the said [*mortgagee*] was a mortgagee within the meaning of the said acts of Parliament; and that the said [*mortgagee*] was dead without an heir, or, if he had left an heir, that such heir could not be found; and that it was not known who was such heir; and that the said Master approved of the said [A. B.] as a proper person to convey the said hereditaments, in the place of the heir of the said [*mortgagee*], to the said [*executors*], or as they should direct or appoint. AND WHEREAS, by an order of the said Vice-Chancellor, bearing date the —— day of ——, the said report of the said Master was confirmed, and the said [A. B.] was ordered to convey the said hereditaments to the said [*executors*], or as they should direct or appoint, pursuant to the said acts of Parliament, and according to the said report."

[The above recital is unnecessarily long, and the following may very properly be substituted for it :—

Short recital of order in Chancery for conveyance where heir is not known.

"AND WHEREAS, the said [*executors*] and [*mortgagor*] having been unable, after making diligent inquiry, to discover the heir of the said [*mortgagee*], it was, by an order of Vice-Chancellor Sir James Wigram, dated the —— day of ——, and duly made upon the petition of the said [*executors*] and [*mortgagor*], and the report of Master Duckworth thereon, ordered that the said [A. B.], in the place of the heir of the said [*mortgagor*], should convey the said hereditaments to the said [*executors*], or as they should direct."]

[An order for a conveyance by an infant heir may be recited in a similar manner.]

(*b*) [The order for a conveyance by an infant heir of a mortgagee is made under the stat. 11 Geo. 4 & 1 Will. 4, c. 60, s. 6. *In re Kent*, 9 Sim. 501 ; *Ex parte Ommaney*, 10 Sim. 298 ; vide ante, Vol. 6, pp. 423, 438.]

72. IN FEE BY INFANT HEIR, OR SUBSTITUTE FOR HEIR OF MORTGAGEE.

and sell, and mortgagor confirms.

[*executors*] do hereby acknowledge, and wherefrom they and also the said [*mortgagor*] do hereby acquit, release, and for ever discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, [and also in consideration of 10*s.* already paid by the said [*purchaser*] to each of them the said [*heir*] and [*mortgagor*], the respective receipts whereof are hereby acknowledged,] the said [*heir*], as such heir as aforesaid (*c*), by the direction and appointment of the said [*executors*], and with the assent of the said [*mortgagor*] and the said [*executors*], as such executors as aforesaid, *Do*, and each of them *Doth*, by these presents, made &c., (*ut ante, p.* 72), bargain, sell, and release, and the said [*mortgagor*] *Doth* grant, bargain, sell, release, and confirm, unto the said [*purchaser*], and his heirs, ALL &c., (*parcels and general words*). And all the estate, right, title, interest, and authority of the said [*heir*], [*executors*], and [*mortgagor*], respectively, both at law and in equity, in, to, or over the said hereditaments and premises, and every part thereof, and all deeds, &c. To HOLD the said hereditaments and premises unto the said [*purchaser*], and his heirs, for ever, To SUCH USES &c. (*ut ante, p.* 73). AND each of them the said [*executors*], for himself, his heirs, executors, and administrators, hereby covenants with the said [*purchaser*], and his heirs, that he the said covenanting party hath not heretofore made, done, or permitted, or been party or privy to, any act, deed, matter, or thing, whereby or by means whereof the said hereditaments and premises, or any of them, or any part thereof, are, is, can, or may be charged, aliened, encumbered, or prejudicially affected (*d*). IN WITNESS &c.]

Parcels.

Habendum to uses to prevent dower.

Covenant by executors that they have not encumbered.

(*c*) "the said [*substitute*], as such person appointed to convey as aforesaid,"

As to mortgagor's covenants.

(*d*) [It is unnecessary to make the mortgagor covenant for the title, &c., as he has already done so in the mortgage-deed. If, indeed, as frequently happens, his covenants in that deed were not properly qualified, he may make the discharge of his absolute covenants the condition of his joining in the present conveyance. But as to the necessity for this, vide ante, Vol. 5, p. 513. In such case the purchaser may expressly release the mortgagor from his former covenants. For the sake of brevity the mortgagor's covenants may be thus introduced :—

"And the said [*mortgagor*], for himself, his heirs, executors, and administrators, and by way of substitution for and in discharge of the covenants on his part contained in the

72. IN FEE BY INFANT HEIR, OR SUBSTITUTE FOR HEIR OF MORTGAGEE.

above-recited indenture of the —— day of ——, (from which covenants the said [*purchaser*] doth hereby accordingly release and discharge the said mortgagor, his heirs, executors, and administrators), doth hereby covenant with the said [*purchaser*] and his heirs, that, notwithstanding &c. (*ut ante, p.* 207).]

73. TO A PURCHASER AND HIS MORTGAGEE.

73. RELEASE *in* FEE *by a* MORTGAGEE *under a* POWER *of* SALE, *to Uses in favour of a* PURCHASER, *and also of a Person who* ADVANCES PART *of the* PURCHASE-MONEY, *which is secured by the Limitation of a* TERM *of Years to the Lender by way of* MORTGAGE. (*Variation where* MORTGAGE *is in* FEE.)

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; [*purchaser*], of &c., of the second part; [*mortgagee*], of &c., of the third part; and [*dower trustee* (*a*)], of &c., of the fourth part; (*Recite mortgage-deed containing power of sale; default, and that principal and interest remain owing, ut ante, p.* 204).

Recital of mortgage;

—of contract for sale;

AND WHEREAS the said [*mortgagee*] hath in pursuance of the power vested in him by the hereinbefore-recited indenture of mortgage, contracted with the said [*purchaser*] for the absolute sale to him of the hereditaments hereinafter described and hereby released, or intended so to be, (being part of the hereditaments comprised in the hereinbefore-recited indenture of mortgage), for an estate of inheritance in fee-simple in possession, free from all incumbrances, at or for the price or sum of 1000*l.* (*b*).

—of agreement to advance money on mortgage.

AND WHEREAS the said [*mortgagee*], on the application of the said [*purchaser*], and in order to enable him to complete his said purchase, hath agreed to advance and lend to him the said [*purchaser*] the sum of 700*l.*,

(*a*) If the mortgage to the new mortgagee is in fee, the dower trustee should not be a party.

(*b*) [For the form of the recitals when the sale was by auction, (which, however, if the power authorized a sale by private contract, it is not necessary to recite in the conveyance), vide ante, p. 263, or p. 278.]

73. TO A PURCHASER AND HIS MORTGAGEE.

at interest, to be secured by a mortgage of the said hereditaments, and to be payable at the time and in manner hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 700*l.* sterling, part of the said purchase-money or sum of 1000*l.*, to the said [*vendor*] paid by the said [*mortgagee*] at or immediately before the execution of these presents, (at the request of the said [*purchaser*], testified by his executing these presents), the receipt whereof the said [*vendor*] doth hereby acknowledge, and therefrom doth release and discharge the said [*mortgagee*], his heirs, executors, administrators, and assigns, and also the said [*purchaser*], his heirs, executors, administrators, and assigns, for ever, by these presents; And also, in further consideration of the sum of 300*l.* sterling, being the remaining part of the said purchase-money or sum of 1000*l.*, to the said [*vendor*] paid by the said [*purchaser*] at or immediately before the execution of these presents, the receipt of which sum of 300*l.* the said [*vendor*] doth hereby also acknowledge, and therefrom doth release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, for ever, by these presents; He, the said [*vendor*], in pursuance of, and according to, his estate and interest under or by virtue of the said indenture of release and mortgage, *Doth*, by these presents, made &c., (*ut ante*, *p.* 72), bargain, sell, release, and convey unto the said [*purchaser*], and his heirs, ALL THAT &c., together with all ways, &c. And all the estate, &c. And all deeds, &c., except the said indentures of lease and release or mortgage, which are hereinafter covenanted to be produced. TO HAVE AND TO HOLD the said hereditaments and premises unto the said [*mortgagee*] (*c*), and his heirs, for ever (*d*), TO THE USE of the said [*mortgagee*], his

Testatum.

In consideration of part of purchase-money paid by the mortgagee, and the residue by the purchaser,

vendor conveys the premises.

Habendum.

To the use of

(*c*) The reason for making the mortgagee the releasee to uses in this instance is, that it renders him the grantee of the title-deeds, which of course are to be placed in his possession, but to which as a *termor* he would not be entitled except by express grant; and it is not clear that such grant would enure to the use of the cestui que use. Vide ante, p. 88. At all events, it is better to avoid the question.

Reason for making the conveyance to the mortgagee.

(*d*) If the mortgage is to be in fee, say—

"TO THE USE of the said [*mortgagee*], his heirs and assigns, for ever, subject nevertheless to the proviso for redemption hereinafter contained."

73. TO A PURCHASER AND HIS MORTGAGEE.

executors, administrators, and assigns, from the day next before the day of the date hereof, for and during and unto the full end and term of two thousand years thence next ensuing, and fully to be complete and ended, without impeachment of or for any manner of waste, subject to the proviso hereinafter contained for making void the said term; And from and after the expiration or other determination of the said term of two thousand years, and in the meantime subject thereto, (*to uses to prevent dower, ut ante, p.* 73). AND the said [*vendor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagee*], and his heirs, That he the said [*vendor*] hath not at any time heretofore exercised the power of selling given or reserved by the said indenture of release and mortgage, so far as the same relates to or concerns the hereditaments hereinbefore mentioned and expressed to be hereby released, or any part thereof respectively; And that he hath not at any time heretofore made, done, committed, or suffered any act, matter, or thing whatsoever, by means whereof the same hereditaments and premises, or any part thereof respectively, are or is conveyed, assured, impeached, charged, or encumbered; (*And also to produce the hereinbefore-recited indentures of lease and release or mortgage, to any person or persons entitled to or interested in the premises under the limitations hereinbefore contained, ut ante, p.* 447). PROVIDED ALWAYS, and it is hereby agreed and declared, that, in case the said [*purchaser*], his heirs, executors, administrators, or assigns, shall and do pay, or cause to be paid, unto the said [*mortgagee*], his executors, administrators, or assigns, on the —— day of —— now next ensuing, the sum of 700*l.* sterling, together with interest for the same in the meantime after the rate of 5*l.* for every 100*l.*, by the year, free from taxes, and without any other deduction whatsoever, then, and in such case, and immediately after such payment so made, the said (*e*) term of two thousand years hereby

the mortgagee for two thousand years;

subject thereto, to uses to prevent dower.

Covenant by vendor that power of selling is unexercised,

and that he has not encumbered.

Proviso for cesser of term, on payment of principal and interest monies.

(*e*) If the mortgage is in fee, substitute the following—

Variation where mortgage is in fee.

"[*mortgagee*], his heirs or assigns, will or shall, on the request and at the costs and charges of the said [*purchaser*], his heirs or assigns, convey and assure the said —— and premises, unto and to the use of the said [*purchaser*], his heirs and assigns, or in such other manner as he or they

limited in use to the said [*mortgagee*], his executors, administrators, and assigns, shall cease, determine, and be utterly void, anything hereinbefore contained to the contrary thereof notwithstanding. AND the said [*purchaser*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagee*], his (*f*) executors and administrators, in manner following, that is to say, *That* he the said [*purchaser*], his heirs, executors, administrators, or assigns, will or shall pay or cause to be paid, unto the said [*mortgagee*], his executors, administrators, or assigns, the said sum of 700*l.*, with interest for the same after the rate aforesaid, free from taxes, and without any other deduction except as aforesaid, at the place and on the days and times, and in manner hereinbefore appointed for payment thereof, according to the form and effect of the aforesaid proviso, and the true intent and meaning of these presents; *And that* (*g*) the said [*vendor*] now hath in himself good right, full power, and lawful and absolute authority, to bargain,

73. TO A PURCHASER AND HIS MORTGAGEE.

Covenant by mortgagor for payment of mortgage-money,

that vendor has right to convey,

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shall direct, free from all incumbrances created by the said [*mortgagee*], his heirs, executors, administrators, or assigns, in the meantime." (*Add trusts for sale in default of payment if so intended, ut ante, Vol.* 5, *p.* 564).

(*f*) If the mortgage is in fee, say "heirs, executors," &c. The covenants will be construed referendo singula singulis. [See *Lougher* v. *Williams*, 2 Lev. 92; ante, p. 338.]

(*g*) It is usual, in cases such as the present, for the purchaser not to enter into covenants as to the vendor's being seised and having power to convey, but merely to covenant for the quiet enjoyment and further assurance. There seems, however, to be no ground for such a departure from the ordinary rule; for the fact, that the property has never vested in the purchaser antecedently to the creation of the mortgage, even if it excluded the possibility of its being affected by his acts, (which it does not, as the equitable interest acquired by him under a contract might have been affected by Crown specialty debts), affords no reason why he should not covenant for the title in the same manner as he would have done if the property had previously belonged to him, since a mortgagor's covenants extend not to his own acts only, but to the acts of all persons whomsoever; and in this case, equally with others, it is proper that the mortgagee should be enabled to bring an action immediately on the discovery of a defect of title, although the time appointed for the payment of the money may not have arrived. The circumstance, that in this instance the vendor, being a trustee only, has entered into no covenants for title, is immaterial. The purchaser's covenants with the mortgagee would be the same if there were the usual limited or even absolute covenants on the part of the vendor.

Suggestion as to the purchaser's covenant for the title.

73. TO A PURCHASER AND HIS MORTGAGEE.

sell, release, or otherwise assure the said hereditaments and premises (*h*) to the use of the said [*mortgagee*], his executors, administrators, and assigns, for the said term of two thousand years hereinbefore limited to him and them, in manner aforesaid, according to the true intent and meaning of these presents; *And that*, after default shall have been made in payment of the said sum of 700*l.*, or the interest thereon, or of any part thereof respectively, at or upon the day or time hereinbefore appointed for payment thereof respectively, contrary to the true intent and meaning of these presents, it shall be lawful for the said [*mortgagee*], his (*i*) executors, administrators, and assigns, from time to time, and at all times thereafter, during the then residue of the said term of two thousand years thereby limited to the use of the said [*mortgagee*] as aforesaid, peaceably and quietly to enter into and upon, and to hold and enjoy, the said hereditaments and premises, and to receive and take the rents and profits thereof for his and their own use, without any interruption or disturbance whatsoever, from or by the said [*purchaser*], his heirs or assigns, or any other person or persons whomsoever; *And that* free and clear, and freely, clearly, and absolutely exonerated and discharged, or otherwise by the said [*purchaser*], his heirs, executors, or administrators, well and sufficiently saved harmless and kept indemnified of, from, and against all and all manner of former and other estates, titles, liens, charges, and incumbrances whatsoever; *And moreover*, that he the said [*purchaser*], and his heirs, and every other person lawfully claiming any estate, right, title, or interest in, to, or out of the said hereditaments and premises, or any part or parts thereof, will and shall, from time to time, and at all times hereafter, at the request of the said [*mortgagee*], his executors, administrators, or assigns, but at the costs and charges of the said [*purchaser*], his heirs, executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and exe-

—for quiet enjoyment,

—free from incumbrances;

—for further assurance.

(*h*) If the mortgage is in fee, say—

Variation where mortgage is in fee.

"unto and to the use of the said [*mortgagee*], his heirs and assigns for ever, according" &c.

(*i*) If the mortgage is in fee, say—

"heirs and assigns, from time to time, and at all times for ever thereafter, peaceably" &c.

73. TO A PURCHASER AND HIS MORTGAGEE.

cuted, all such further acts, deeds, and things, conveyances and assurances whatsoever, for the more effectually granting, conveying, and assuring the said hereditaments and premises (*k*) hereinbefore limited to the use of the said [*mortgagee*], his executors, administrators, or assigns, for the said term of two thousand years as aforesaid, with their appurtenances, unto the said [*mortgagee*], his executors, administrators, and assigns, for all the residue which shall be then unexpired of the said term of two thousand years therein, in manner aforesaid, according to the true intent and meaning of these presents, as by the said [*mortgagee*], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised, or devised and required. AND *it is hereby agreed and declared*, between and by the said [*purchaser*] and [*mortgagee*], that in the meantime, and until default shall happen to be made in payment of the said sum of 700*l.*, or the interest thereof, or of some part thereof respectively, contrary to the true intent and meaning of the aforesaid proviso and covenant for payment of the same, it shall be lawful for the said [*purchaser*], his heirs and assigns, to hold, possess, and enjoy the said hereditaments and premises, and to receive and take the rents and profits thereof for his and their own use and benefit, without any interruption or disturbance from or by the said [*mortgagee*], his (*l*) executors, administrators, or assigns, or from or by any other person or persons lawfully claiming through or under him or them. IN WITNESS &c.

Declaration that mortgagors shall hold till default in payment.

(*k*) If the mortgage is in fee, say—

"unto and to the use of the said [*mortgagee*], his heirs and assigns for ever, in manner aforesaid, according" &c.

If the mortgagee is invested with a power of sale, the covenant for further assurance will be varied, ut ante, Vol 5, p. 570.

(*l*) If the mortgage is in fee, say—"heirs, executors," &c.

74. SURRENDER OF LEASE FOR YEARS.

74. SURRENDER (*a*) *of a* LEASE *for the* RESIDUE *of a* TERM *to the* REVERSIONER, *in Consideration of Money, and a Release of Claims for Rent, &c.* (*Short Form*).

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part.

Recital of lease;

WHEREAS, by an indenture of lease, bearing date on or about the —— day of ——, made between the said [*purchaser*], of the one part, and the said [*vendor*], of the other part, the said [*purchaser*] did demise unto the said [*vendor*], ALL THAT (*parcels*), with the appurtenances thereto belonging; *To hold* the same unto the said [*vendor*], his executors, administrators, and assigns, for the term of twenty-one years, commencing from the —— day of —— then last, at the yearly rent of £——, and subject to the observance and performance of certain conditions and covenants on the part of the said [*vendor*], his executors, administrators, and assigns, to be observed and performed.

—of certain claims made by the purchaser on the vendor;

AND WHEREAS the said [*vendor*] is now indebted unto the said [*purchaser*] in a considerable sum of money for arrears of rent; And the said [*purchaser*] also claims from the said [*vendor*] a pecuniary compensation in respect of the breach of certain covenants contained in the hereinbefore-recited indenture of lease, which the said [*purchaser*] alleges to have been broken or infringed by the said [*vendor*].

—contract for surrender.

AND WHEREAS it has been agreed between the said [*vendor*] and [*purchaser*], that, in consideration of the said [*purchaser*] releasing to the said [*vendor*] all claims and demands in respect of the said arrears of rent and breach of covenants, and otherwise, by reason of the hereinbefore-recited indenture of lease, and also paying to the said [*vendor*] the sum of 50*l.*, he the said [*vendor*] shall surrender to the said [*purchaser*] the residue now unexpired of the said term of twenty-one years, granted by the hereinbefore-recited indenture of lease.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 50*l.* sterling paid by the said [*purchaser*] to the said [*vendor*] on the exe-

Vendor, in consideration &c., surrenders to purchaser.

(*a*) [As to surrenders, vide ante, Vol. 4, p. 477.]

74. SURRENDER OF LEASE FOR YEARS.

cution of these presents (*b*), the receipt whereof is hereby acknowledged; And also in consideration of the release hereinafter contained on the part of the said [*purchaser*], he the said [*vendor*] *Doth*, by these presents, assign, surrender, and yield up unto the said [*purchaser*], his heirs and assigns, All and singular the hereditaments and premises comprised in and demised by the above-recited indenture of lease; And all the estate, right, title, interest, term of years, benefit, claim, and demand whatsoever, either at law or in equity, or otherwise howsoever, of him the said [*vendor*], in, to, of, and upon the said premises; *To the intent* that the residue now unexpired of the said term of twenty-one years, granted by the hereinbefore-recited indenture of lease, and all other the estate, term, and interest, of the said [*vendor*] in the said hereditaments and premises thereby demised, under or by virtue of the same indenture, may be merged and extinguished in the freehold and inheritance of the same premises; and to or for no other intent or purpose whatsoever. AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*purchaser*], his heirs and assigns, that, notwithstanding any act or deed whatsoever done or permitted by the said [*vendor*], he the said [*vendor*] now hath in himself good right and absolute authority to surrender the said hereditaments and premises unto the said [*purchaser*], his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents; *And also*, that it shall be lawful for the said [*purchaser*], his heirs and assigns, to hold and enjoy the said hereditaments and premises for all the residue now unexpired of the said term of twenty-one years, without any interruption or disturbance whatsoever from or by the said [*vendor*], his executors or administrators, or any person or persons claiming through or under him or them; *And that* free from all estates, titles, charges, and incumbrances created or occasioned by the said [*vendor*], or any person or persons claiming through or under him, or by means of his or their act or default; *And, lastly*, that he the said [*vendor*], his executors or administrators, and every person claiming through or under him or them, will and shall, at any time hereafter, on

Parcels;

and all the estate, &c.

To the intent that term may merge.

Covenants by vendor,

—that he has power to surrender;

—for quiet enjoyment,

free from incumbrances;

and for further assurance.

(*b*) The ad valorem duty is payable on the pecuniary consideration only. Stamp.

74. SURRENDER OF LEASE FOR YEARS.

the request and at the costs of the said [*purchaser*], his heirs or assigns, surrender or otherwise assure unto him or them, or as he or they shall direct, All and singular the hereditaments and premises hereby surrendered or intended so to be, for all the residue now unexpired of the said term of twenty-one years, granted by the above-recited indenture of lease, and for all other the estate, term, and interest of the said [*vendor*] in the said premises, by virtue of the same indenture, as by the said [*purchaser*], his heirs or assigns, or his or their counsel in the law, shall be reasonably required.

Further testatum.

AND THIS INDENTURE ALSO WITNESSETH, that,

Release by purchaser to vendor.

in pursuance of the said agreement, and in consideration of the surrender hereinbefore contained on the part of the said [*vendor*], he the said [*purchaser*] *Doth*, by these presents, absolutely remise, release, and quit claim unto the said [*vendor*], his heirs, executors, or administrators, all and all manner of actions, suits, claims, and demands whatsoever, which he the said [*purchaser*] now hath, and which he, his heirs, executors, or administrators, may or might hereafter have upon or against the said [*vendor*], his heirs, executors, or administrators, by reason of the above-mentioned arrear of rent and breach of covenants, or otherwise, by virtue or in respect of the above-recited indenture of lease, or any covenant, matter, or thing therein contained. IN WITNESS &c.

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75. SURRENDER OF ESTATE FOR LIFE.

75. SURRENDER *of an* ESTATE *for* LIFE *in Possession, and also of the* REMAINDER *expectant thereon of* TRUSTEES *to* PRESERVE CONTINGENT REMAINDERS (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; [*trustees to preserve con-*

Reason for the junction of the trustees to preserve contingent remainders.

(*a*) The reason for requiring the junction of the trustees for preserving contingent remainders in this instance is, that their estate in remainder being interposed between the respective estates of the vendor and purchaser, would, if left outstanding, have prevented the present deed from operating as a surrender. As no contingent remainder could in event become vested, it was not improper to call on the trustees to surrender their estate.

If A. the father had been living, the purchased estate for life could not

tingent remainders], of &c., of the second part; and [*purchaser*], of &c., of the third part. (*Recite will, whereby lands* 75. SURRENDER OF ESTATE FOR LIFE.

Recital of will,

with propriety have been surrendered; for in that case, as he might have other children, who would have been entitled to share the remainder with their elder brother, the present purchaser, if they came in esse during the life of the tenant for life, (*i. e.* the vendor), the merger of the estate for life might give rise to some nice questions in regard to its effect upon the rights of such children, and there would be ground to contend that they participated in the benefit of the merger of the estate for life purchased by their elder brother. To prevent this consequence, the estate limited to preserve contingent remainders might have been left outstanding in the trustees, the purchased estate for life being conveyed by the vendor to the purchaser by lease and release.

As to mode of conveying particular estate, when purchased by remainder-man.

Indeed, though it has been deemed proper to furnish a form of a deed of surrender of an estate for life, yet it is not often that such a deed is wanted: for where a reversioner or remainder-man in fee purchases the preceding estate for life, it is generally advisable, instead of making the vendor surrender to the purchaser, which, if the estate for life was in possession, would render the wife of the latter dowable, to make them both join in limiting the entire fee-simple to uses to prevent dower, for the benefit of the purchaser.

Sometimes, however, it is proper to keep on foot the particular estate, and then, of course, this mode of assurance, which extinguishes that estate must not be adopted, but the estate for life should be conveyed to a trustee for the purchaser; or, previously to his (the purchaser's) taking a conveyance of the life estate to himself, his reversion or remainder in fee might be vested in a trustee; which would also be attended with this advantage, that the determination of the preceding life estate, which would reduce the reversion or remainder to an estate in possession, would not let in his wife's dower. If the reversion or remainder had been previously limited to uses to prevent dower, it would still be necessary to convey the purchased estate for life to a trustee, if it were intended to keep it on foot, because such estate would merge in the estate for life of the purchaser, derived under those uses. If there was no intention of preserving the purchased estate for life, it might confidently be conveyed to the purchaser by way of surrender, as it seems to be clear beyond controversy that an estate per auter vie will merge, and may, therefore, be extinguished by surrender, in an estate for one's own life.

Remedies against lessees destroyed by extinction of immediate reversion.

One, and the most frequent, object in keeping on foot the particular estate is to preserve the remedies against a lessee under a subsisting lease, derived out of that estate. Thus, supposing A. to be tenant for life, with remainder or reversion to B. in fee, and A. to grant a lease at rack-rent for twenty-one years, if he shall so long live, the lessee entering into the usual covenants, and then to sell his life estate to B.; if the purchaser B. were to take a surrender of A.'s life estate, his claim to the rent, and his remedies on the covenants in the lease, would be lost by the extinguishment of the reversion immediately expectant on the lease to which such rents and covenants were incident. As to which, vide ante, Vol. 4, p. 515.

75. SURRENDER OF ESTATE FOR LIFE.

were devised to vendor for life, remainder to the trustees to preserve contingent remainders during the life of the vendor, with remainder to the child or children of A. *in fee; death of testator without revoking or altering will; probate of will; and that purchaser was the only child of* A., *who was dead*). AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of his estate for life in the —— and hereditaments hereinafter described and intended to be hereby surrendered, at the price or sum of £——; and the said [*vendor*] and [*purchaser*] respectively have requested the said [*trustees*] to join in surrendering the same hereditaments in the manner hereinafter expressed, which the said [*trustees*] have agreed to do. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— sterling paid by the said [*purchaser*] to the said [*vendor*], at or immediately before the execution of these presents, the receipt &c., and also in consideration of 10*s.* already paid by the said [*purchaser*] to the said [*trustee*], They the said [*trustees*], at the request and by the direction of the said [*vendor*] and [*purchaser*], testified by their severally executing these presents, *Do*, and each of them *Doth*, by these presents, bargain, sell, surrender, and yield up, And the said [*vendor*] *Doth*, by these presents, grant, bargain, sell, surrender, and yield up, unto the said [*purchaser*], his heirs and assigns, ALL THAT (*parcels and general words*), And all the estate, &c.; *To the intent* that the several estates of the said [*trustees*] and [*vendor*] respectively may be merged and utterly extinguished in and consolidated with the ultimate remainder and inheritance in fee-simple of the said hereditaments and premises hereby surrendered, or intended so to be, and to or for no other intent or purpose whatsoever. (*Covenant by trustees that they have done no act to encumber, ut ante, p.* 75; *also covenant by vendor, that, notwithstanding any act done by him or by the testator, deceased, he has power to surrender; for peaceable enjoyment, free from incumbrances; and for further assurance, ut ante, p.* 323). IN WITNESS &c.

—contract for purchase.

Testatum.

Surrender.

Parcels.

Covenants.

76. GRANT *of an* ADVOWSON *in Fee, in* CONSIDERATION *of the Purchaser paying the same* ANNUITY *as the* VENDOR *had* COVENANTED *to* PAY *when he purchased it; with a* COVENANT *by the* PURCHASER *to* PAY *the* ANNUITY *and* INDEMNIFY (*a*). (*Variation where Purchaser gives a* BOND OF INDEMNITY). 76. ADVOWSON IN FEE.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part, and [*purchaser*], of &c., of the other part. WHEREAS, by an indenture bearing date on or about the —— day of ——, and made between [A. B.], of the one part, and the said [*vendor*], of the other part, *It is witnessed*, that, in consideration of the bond of the said [*vendor*], bearing even date with the indenture now in recital, in the penalty of £——, conditioned for the payment unto the said [A. B.] and his assigns, for his life, of an annuity of £——, clear of all deductions, at the times and in manner therein mentioned; (and which bond, and the annuity thereby secured, are expressed to be in full for the absolute purchase of the advowson and hereditaments therein and hereinafter mentioned, and of the fee-simple and inheritance thereof, with the appurtenances, free from incumbrances); The said [A. B.] did grant, bargain, sell, and convey unto the said [*vendor*], his heirs and assigns, All that the advowson, donation, right of patronage and presentation of, in, and to the rectory or parish church of [R.], in the county of ——, with all and every the rights, members, and appurtenances whatsoever to the same belonging or in anywise appertaining, *To hold* the same unto and to the use of the said [*vendor*], his heirs and assigns, for ever. AND WHEREAS the said [A. B.] afterwards obtained her Majesty's licence and consent to use the surname and bear the arms of [C.], instead of the surname and arms of [B.]. AND WHEREAS the said [*vendor*] hath agreed to grant the said advowson and hereditaments unto and to the use of the said

Parties.

Recital of grant to vendor;

—of annuitant having changed his name;

—of agreement to purchase.

(*a*) As no pecuniary consideration passes from the purchaser to the vendor, this deed is not subject to any ad valorem stamp. Stamp.

76. ADVOWSON IN FEE.

[*purchaser*], his heirs and assigns, in consideration of the (*b*) covenant hereinafter contained on the part of the said [*purchaser*] for payment of the said annuity of £——, so secured to the said [A. C.] during his life as aforesaid, and for the indemnity of the said [*vendor*], as hereinafter mentioned.

Testatum. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the (*c*) covenant hereinafter contained on the part of the said [*purchaser*], his heirs, executors, and administrators, for payment of the aforesaid annuity of £——, and for the indemnity of the said [*vendor*], his heirs, executors, and administrators, And in consideration of 10*s.* to the said [*vendor*] by the said [*purchaser*] in hand paid at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged,

Grant. the said [*vendor*] *Doth*, by these presents, grant, bargain, sell, and confirm (*d*), unto the said [*purchaser*], his

Parcels. heirs and assigns, ALL THAT the advowson, donation, right

Advowson and general words. of patronage and presentation of, in, and to the rectory or parish church of [R.], in the said county of ——, with all and every the rights, members, and appurtenances whatsoever to the same belonging, or in anywise appertaining, accepted, reputed, deemed, taken, or known as or to be part,

Reversion. parcel, or member thereof; And the reversion and reversions,

Estate. remainder and remainders thereof; And all the estate, right, title, interest, property, claim, and demand whatsoever of him the said [*vendor*] in, to, and out of the said advowson and premises.

Habendum. TO HAVE AND TO HOLD the said advowson, hereditaments, and premises, unto the said [*purchaser*],

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(*b*) If the purchaser gives a bond for payment of the annuity, which is, in general, the preferable course, the subsequent part of the recital will be varied thus :—

Variation where the purchaser gives a bond of indemnity. "bond of the said [*purchaser*] hereinafter referred to, conditioned for the payment" &c.

(*c*) "bond of the said [*purchaser*], bearing even date with these presents, in the penalty of £——, conditioned for the payment of the aforesaid annuity, and for the indemnity of the said [*vendor*], his heirs, executors, and administrators, therefrom, in the manner in the condition of the said bond expressed, And in consideration of 10*s.*," &c.

Mode of conveying an advowson. (*d*) In some of the printed forms, an advowson is conveyed by lease and release, but a lease for a year is quite unnecessary. Being an incorporeal hereditament, it passes by deed of grant.

76. ADVOWSON IN FEE.

his heirs and assigns, (*to uses to prevent dower, ut ante, p.* 73, *or*), To THE USE and behoof of the said [*purchaser*], his heirs and assigns, for ever, [and to and for no other use, intent, or purpose whatsoever]. AND the said [*vendor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*purchaser*] and his heirs, in manner following, (that is to say), that notwithstanding any act, matter, or thing by him the said [*vendor*] made, done, committed, or suffered to the contrary, he the said [*vendor*] [is, at the time of the sealing and delivery of these presents, lawfully, rightfully, and absolutely seised of or entitled to the said advowson, hereditaments, and premises, and the inheritance thereof in fee-simple; *And that*, notwithstanding any such act, matter, or thing as aforesaid, the said [*vendor*]] now hath in himself good right, full power, and lawful and absolute authority to grant and assure the same advowson, hereditaments, and premises, unto and to the use of the said [*purchaser*], his heirs and assigns, in manner aforesaid, and according to the true intent and meaning of these presents; *And further*, that it shall be lawful for the said [*purchaser*], his heirs and assigns, from time to time, and at all times hereafter, whenever the said church shall, by the death, resignation, deprivation, cession, or change of any rector or incumbent thereof, or otherwise, happen to become vacant, to present some other qualified clerk to succeed in the said church, as the rector or parson thereof, and to do all other acts which shall of right appertain to the office of patron of the said rectory or church, as fully and amply as he the said [*vendor*], his heirs or assigns, might or could do if these presents had not been made, without any interruption or disturbance whatsoever from or by him the said [*vendor*], his heirs or assigns, or any other person or persons claiming through or under him or them; *And that* free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said [*vendor*], his heirs, executors, or administrators, effectually saved and kept harmless and indemnified from and against all former and other gifts, grants, charges, and incumbrances whatsoever, made, done, executed, committed, or suffered by the said [*vendor*], or any other person or persons claiming through or under him, or by or through his or their acts, default, means, consent, or procurement; *And moreover*, that he the said [*vendor*], his heirs and assigns,

To the use of purchaser in fee.

Covenant by vendor that he is seised in fee;

Has good right to convey;

For quiet enjoyment of the right of presentation;

Free from incumbrances;

For further assurance.

76. ADVOWSON IN FEE.

and every other person claiming through or under him or them, will, from time to time, and at all times hereafter, upon the request and at the costs and charges of the said [*purchaser*], his heirs or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all such further acts, grants, conveyances, and assurances in the law whatsoever, for the more effectually granting and assuring the said advowson, hereditaments, and premises, with the appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns, for ever, or otherwise, as he or they shall direct, as by the said [*purchaser*], his heirs or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required, [so that, &c., (*ut ante*, *p.* 77)]. AND THIS INDENTURE FURTHER WITNESSETH (*e*), that, in consideration of the grant hereinbefore made of the said advowson and premises, with the appurtenances, the said [*purchaser*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said [*vendor*], his heirs, executors, and administrators, That he the said [*purchaser*], his heirs, executors, or administrators, will or shall, from time to time and at all times hereafter during the life of the said [A. C.], pay, or cause to be paid, unto the said [A. C.] and his assigns, the said annuity or yearly sum of £——, secured to him and them by the bond hereinbefore mentioned or referred to, bearing date on or about the —— day of ——, when and as the same annuity shall henceforth become due and payable; And also will or shall, from time to time and at all times hereafter, save harmless and keep indemnified the said [*vendor*], his heirs, executors, and administrators, of, from, and against all actions, suits, and other proceedings which shall or may be brought, had, commenced, or prosecuted against the said [*vendor*], his heirs, executors, or administrators, and all costs, charges, damages, and expenses which he or they shall or may sustain, expend, be at or put unto by reason or on account of the non-payment of the said annuity or yearly sum of £——, by the said [*purchaser*], his heirs, executors, or administrators, pursuant to the covenant of the said [*purchaser*] hereinbefore contained. IN WITNESS &c.

Further testatum.

Covenant by purchaser to pay the annuity;

— and indemnify vendor.

(*e*) If a bond is given by the purchaser, of course this testatum clause will be omitted. The convenience attending a bond is, that it is delivered to the obligee, whereas the covenant, being contained in the grant, passes into the hands of the covenantor.

77. GRANT *of the* NEXT PRESENTATION *to a* RECTORY, *in Consideration of an* ANNUITY *secured by an Indenture of even Date. Covenants for the Title, and to* PRODUCE TITLE-DEEDS. 77. GRANT OF NEXT PRESENTATION.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part. WHEREAS the said [*vendor*] is seised of or otherwise well entitled to the perpetual advowson, right of patronage and presentation of and to the rectory or parish church of ——, and the inheritance thereof in fee-simple; of which rectory or parsonage the Reverend [A. B.] is the present incumbent. AND WHEREAS the said [*vendor*] hath agreed to grant unto the said [*purchaser*], his executors, administrators, and assigns, the next turn or presentation to the said rectory or parsonage, when the same shall first and next happen to become vacant, in consideration of an annuity or clear yearly sum of £——, secured or intended to be secured to be paid to the said [*vendor*] and his assigns, free from all taxes and deductions whatsoever, during the term of his natural life, by half-yearly payments, together with a proportional part of the said annuity for the time which, at the decease of the said [*vendor*], shall have elapsed since the then last preceding day of half-yearly payment thereof, by indenture bearing even date with these presents, and made between the said [*purchaser*], of the first part, the said [*vendor*], of the second part, and [A. B.] and [C. D.], of the third part. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of an annuity or yearly sum of £—— (*a*), to the satisfaction

Parties. Recital of seisin. —of contract. Testatum. Consideration.

(*a*) No ad valorem duty would attach in this instance to the deed of grant of the next presentation, or to the deed granting the annuity which forms the consideration for it, neither the grant of the next presentation nor the grant of the annuity being for a pecuniary consideration; the transaction is simply an exchange. Where the consideration is pecuniary, the deed, of course, will bear an ad valorem stamp, as in the instance of the transfer of any other species of property. Stamp.

In the case of *Wilmot* v. *Wilkinson*, 6 B. & C. 506; 9 D. & R. 620, stated ante, Vol. 1, p. 719, it was held that an agreement in writing not

77. GRANT OF NEXT PRESENTATION.

of the said [*vendor*], secured or to be secured to be paid to him and his assigns during his life, by indenture bearing even date herewith as aforesaid; And also in consideration of the sum of 5*s.* to the said [*vendor*] in hand paid by the said [*purchaser*], at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, he the said [*vendor*] *Doth* by these presents give and grant (*b*) unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT the first and next donation, nomination, presentation, and free disposition of and to the rectory and parish church of ——, aforesaid, which shall or may happen, accrue, or arise upon or in consequence of the vacancy or avoidance of such rectory or living, by death, resignation, cession, or deprivation, or by whatsoever other ways or means the said church shall first or next happen to be void; *So that and to the intent* that the said [*purchaser*], his executors, administrators, or assigns, shall and may, by force and virtue of these presents, nominate and present to the said rectory or church, whensoever the same church shall first and next happen to become vacant, by death, resignation, cession, or deprivation, or by any other ways or means, such fit and proper person as to him or them shall seem meet, and do all other acts, matters, and things that shall or may be necessary or expedient to be done for that purpose, in as full, large, and ample a manner, to all intents and purposes, as the said [*vendor*], his heirs or assigns, might or could have done if these presents had not been made. AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth covenant and agree with the said [*purchaser*], his executors, administrators, and assigns, by these presents, in manner following, that is to say, That notwithstanding any act, matter, or thing, made, executed, committed, or suffered to the contrary by the said [*vendor*], he the said [*vendor*] now hath in himself good right and

Grant.

Premises.

Next presentation.

Covenant by vendor that he has good right to grant;

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under seal, in consideration of 7000*l.*, to present to a rectory, on the next avoidance, such person as B., the purchaser, should nominate, and to furnish an abstract of title, and execute a conveyance of the next presentation to B., was sufficiently stamped as an agreement only.

(*b*) [The words "grant, assign, transfer, and set over," are frequently used in grants of this kind; but when the right of presentation is, for the first time, severed from the advowson, words of assignment are as inappropriate as they would be in a demise. Vide ante, Vol. 1, p. 569.]

77. GRANT OF NEXT PRESENTATION.

absolute authority to grant the next presentation of and to the said rectory and parish church of ——, aforesaid, unto the said [*purchaser*], his executors, administrators, and assigns in manner aforesaid, according to the true intent and meaning of these presents; *And further*, that it shall be lawful to and for the said [*purchaser*], his executors, administrators, and assigns, when the said church shall or may, by the death, resignation, cession, or deprivation of any rector or incumbent thereof, or otherwise, happen next to become vacant, to present some other qualified clerk to succeed in the said church as the rector or parson thereof, and to do all other acts which to the office of patron of the said rectory or church doth of right belong or appertain, as fully and amply as he the said [*vendor*], his heirs or assigns, might or could have done, if these presents had not been made, without any let, suit, denial, or interruption whatsoever, from or by the said [*vendor*], or any person or persons lawfully claiming through or under him; *And further*, that he the said [*vendor*] and his heirs, and all and every other person or persons lawfully claiming any estate, right, title, or interest, in, to, or out of the said advowson and premises, by, from, through, or under him or them, will and shall, at any time or times, at the request, costs, and charges of the said [*purchaser*], his executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all such further and other lawful acts, deeds, matters, and things, conveyances and assurances in the law whatsoever, for the more effectually and absolutely granting, conveying, and assuring the said next presentation to the said rectory and church unto the said [*purchaser*], his executors, administrators, and assigns, as by the said [*purchaser*], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised, or devised and required; so that the person or persons who shall be required to make and execute such further assurance or assurances, be not compelled or compellable, for the making or doing thereof, to go or travel from his, her, or their dwelling or dwellings, or usual place or places of residence or abode; *And moreover*, that he the said [*vendor*], his heirs, executors, administrators, or assigns, will and shall, from time to time and at all or any time or times, until the right of presentation by virtue of these presents shall have been exercised by the said [*purchaser*], his executors, administrators, or assigns, and

For quiet enjoyment;

For further assurance;

To produce deeds.

77. GRANT OF NEXT PRESENTATION.

afterwards during the life of any clerk whom he or they shall so present to the said rectory or church, upon every reasonable request, and at the costs of the said [*purchaser*], his executors, administrators, or assigns, (he or they giving unto the said [*vendor*], his heirs or assigns, notice in writing of such his or their desire), produce and shew forth, or cause to be produced and shewn forth, to the said [*purchaser*], his executors, administrators, or assigns, or as he or they shall direct, desire, or require, or at any hearing or examination in any court of law or equity, or other judicature, as occasion shall be or require, The several, deeds, evidences, and writings mentioned in the schedule thereof hereunder written, and every or any of them, for the manifestation, defence, and support of the estate, right, title, interest, and property of the said [*purchaser*], his executors, administrators, and assigns, or any or either of them, in or to the said next presentation and premises hereby granted and assured, or intended so to be, Unless the said [*vendor*], his heirs, executors, administrators, or assigns, shall be prevented or hindered from so doing by casualty of fire or other inevitable accident (*c*). IN WITNESS &c.

THE SCHEDULE TO WHICH THE PRECEDING INDENTURE REFERS.

As to clause providing for incumbent being promoted to a see.

(*c*) It is quite unnecessary to introduce the clause sometimes inserted in grants of the next presentation to benefices, that, in case the right of presentation for the next turn should devolve to the Crown, in consequence of the incumbent being promoted to a bishopric, the grantee shall have the next presentation following, since this would be the result without any express provision; vide ante, Vol. 1, pp. 564, 572; besides, the clause was generally defective, being confined to the case of the immediate incumbent being so promoted, whereas it ought to have gone on to provide for a similar event in regard to any future incumbent nominated by the Crown. However, the clause ought not, even with this correction, to be inserted.

78. [GRANT *of* RECTORIAL IMPROPRIATE TITHES *of Specific Lands to the* OWNER *of the* LANDS, *in order that they may merge. Proviso as to Land-tax, &c.*

78. GRANT OF IMPROPRIATE TITHES TO MERGE.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part. WHEREAS, by indenture dated &c., and made &c., ALL THAT the rectory, parsonage, and church of O., with all and singular houses, buildings, glebe and other lands, tithes of corn, grain, and hay, and all other tithes whatsoever, as well great as small, and also all obventions, pensions, portions, fruits, profits, commodities, emoluments, hereditaments, rights, members, and appurtenances whatsoever, in anywise howsoever appertaining or belonging to the said rectory or parsonage (which rectory or parsonage, tithes and appurtenances, formerly belonged to the monastery or priory of L., as parcel of the possessions thereof, and, after the dissolution of the same monastery or priory, were by letters patent of Queen Elizabeth, made under the Great Seal of England, bearing date the —— day of ——, granted to A. B. and C. D., their heirs and assigns, for ever), were conveyed and assured unto and to the use of the said [*vendor*], his heirs and assigns, for ever. AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of all the great and small tithes and portions of tithes of and in the lands and hereditaments hereinafter described, of which hereditaments the said [*purchaser*] is now seised in fee-simple in possession, for the price of £——; and it has been agreed, that the same tithes and portions of tithes shall be granted and conveyed unto the said [*purchaser*], and his heirs, free from all incumbrances, except a proportionate part of the land-tax and other taxes, rates and assessments for or in respect of the said rectory or parsonage, and hereditaments, to the intent that the same may be absolutely merged in the said lands and hereditaments. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration &c., the said [*vendor*] *Doth*, by these presents, grant, bargain, sell, release, and confirm unto the said [*purchaser*] and his heirs, ALL

Parties.

Recital of title to impropriate rectory and tithes;

—of contract for purchase of tithes to merge.

Testatum.

Grant of tithes in particular lands.

78. GRANT OF IMPROPRIATE TITHES TO MERGE.

and all manner of tithes of corn, grain, and hay, and all other tithes whatsoever, both great and small, and all oblations, obventions, pensions, portions, fruits, profits, commodities, emoluments, and hereditaments, to the said rectory or parsonage belonging or appertaining, and issuing, arising, and growing payable or demandable out of, from, or in respect of ALL (*parcels*); AND all the estate, right, title, interest, claim, and demand, both at law and in equity, of him the said [*vendor*], in or to the said tithes, hereditaments, and premises, or in, to, or upon the said lands or hereditaments of the said [*purchaser*], or upon or against the owners or occupiers for the time being thereof, in respect of the same tithes, hereditaments, and premises, or any of them. TO HAVE AND TO HOLD the said tithes, hereditaments, and premises, unto the said [*purchaser*] and his heirs for ever; *So and to the intent*, and each of them the said [*vendor*] and [*purchaser*] Doth hereby declare it to be his will and intent, that the said tithes, hereditaments, and premises, intended to be hereby granted and assured, shall henceforth be absolutely merged and extinguished in the freehold and inheritance of the said lands and hereditaments of the said [*purchaser*], according to the provisions of the act of Parliament in that behalf made and provided. AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said purchaser and his heirs, that notwithstanding, &c. (*he is well seised of or entitled to the said tithes and hereditaments, intended to be hereby granted in fee-simple; for right to grant and assure the said tithes; for quiet enjoyment of the said lands and hereditaments of the said purchaser, free from the said tithes &c.; and for further assurance*). PROVIDED ALWAYS, and it is hereby agreed and declared, and the said [*purchaser*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant with the [*vendor*], his heirs, executors, and administrators, that while and so long as the said rectory and parsonage, or the owner thereof in respect thereof, shall be assessed or rated to the land-tax, poor's rates, church rates, or any other parliamentary or parochial charge, tax, or assessment, upon a rating or assessment including the tithes and hereditaments hereby granted, then and during such assessment or rating, and so long as the same shall continue, the said [*purchaser*], his heirs or assigns, will or shall pay and contribute to the said [*vendor*], his heirs or assigns, such part of the said several taxes, rates, charges, and assessments respectively, as would be payable in

Habendum to merge.

Vendor covenants for title, &c.

Proviso that purchaser shall pay his proportion of land-tax, &c.

78. GRANT OF IMPROPRIATE TITHES TO MERGE.

respect of the said tithes and hereditaments hereby granted, if rated or assessed alone upon or in proportion to the ratings or assessments following: (that is to say),—*s.* per annum for land-tax, a rating towards the poor's rates upon, &c., a rating towards the church rates upon, &c.; The present ratings or assessments in respect of the whole of the said rectory or parsonage, including the tithes and hereditaments hereby granted, being £—— per annum for land-tax, a rating towards the poor's rates upon, &c. PROVIDED ALWAYS, and it is hereby declared and agreed, that either of the said parties hereto, his heirs or assigns, shall be at liberty to require and procure the said tithes and hereditaments hereby granted, or the said lands and hereditaments wherein the same are hereby merged in respect thereof, to be rated or assessed to all or any of the said taxes, rates, charges, and assessments, separately and apart from the said rectory or parsonage (*d*). IN WITNESS &c.]

(*d*) [This deed, so far as concerns the merger of the tithes, must be confirmed under the seal of the Tithe Commissioners. The stat. 6 & 7 Will. 4, c. 71, s. 71, after enacting that no rent-charge in lieu of tithes, "shall merge or be extinguished in any estate of which the person for the time being entitled to such rent-charge may be seised or possessed in the lands on which the same shall be charged," provides, "That it shall be lawful for any person seised in possession of an estate in fee-simple or fee-tail, of any tithes or rent-charge in lieu of tithes, by any deed or declaration under his hand and seal, to be made in such form as the said commissioners shall approve, and to be confirmed under their seal, to release, assign, or otherwise dispose of the same, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands on which the same shall have been charged."]

As to merger of tithes or commutation rent, stat. 6 & 7 Will. 4, c. 71, s. 71.

Tenant in tail or fee-simple may cause tithes or rents to merge.

[The stat. 7 Will. 4 & 1 Vict. c. 69, sect. 12, enacts, "That no deed or declaration authorized by the said act for the commutation, release, or merger of tithes shall be chargeable with any stamp duty." This probably would be construed to mean so far only as the deed is confined to the object of merger, and to have contemplated the case where the owner of the tithes, being also owner of the land, declares that the former shall merge. The precedent in the text is a purchase-deed, upon which it is presumed the ad valorem duty would be payable. This construction, however, reduces the word "release" in the act to insignificancy. See 1 & 2 Vict. c. 64, s. 2, infra.]

7 Will. 4 & 1 Vict. c. 69, s. 12.

Deeds exempt from stamp-duty.

[By the stat. 1 & 2 Vict. c. 64, "An Act to facilitate the Merger of Tithes in Land," after reciting the former act, it is enacted, "That after the passing of this act it shall be lawful for any person or persons who shall either alone or together be seised of, or have the power of acquiring or disposing of the fee-simple in possession of any tithes, or rent-charge in lieu of tithes, by any deed or declaration under his or their hand and seal, or hands and seals, to be made in such form as the Tithe

1 & 2 Vict. c. 64. Royal assent, 4th Aug. 1838.

Persons having power over the fee-simple of tithes or rent may merge them.

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1 & 2 Vict. c. 64.

Commissioners for England and Wales shall approve, and to be confirmed under their seal, to convey, appoint, or otherwise dispose of the same, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands out of or on which the same shall have been issuing or charged. And every such deed or declaration as aforesaid shall be valid and effectual for the purpose aforesaid, although the same may not be executed or made in the manner or with the formalities or requisites which, if this act had not been passed, would have been essential to the validity of any instrument by which such person or persons could have acquired or disposed of the fee-simple in possession of such tithes, or rent-charge in lieu of tithes."

Deeds not chargeable with duty.

[Sect. 2. "That no deed or declaration authorized by this act for the merging of tithes shall be chargeable with any stamp duty."

Where tithes or rent of the lands charged are settled to same uses, tenant for life may merge them.

[Sect. 3. "That in all cases where tithes, or rent-charge in lieu of tithes, and the lands out of which the same are payable, are both settled to the same uses, it shall be lawful for any person in possession of an estate for life in both such lands and tithes, or rent-charge in lieu of tithes, by any deed or declaration under his hand and seal, to be made in such form as the said commissioners shall approve, and to be confirmed under their seal, to release, assign, or otherwise dispose of such tithes or rent-charge, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands out of which such tithes shall have been issuing or on which such rent-charge shall have been charged."

Tithes may be merged in copyhold lands.

[Sect. 4. "And whereas doubts have been entertained whether, according to the true construction of the said act, any tithes, or rent-charge in lieu of tithes, can be merged in lands of copyhold tenure, and it is expedient that such doubts should be removed;" be it enacted, "That the provisions in the said act and this act contained as to the merger of any tithe, or rent-charge in lieu of tithe, shall be deemed and taken to extend to all lands being copyhold of inheritance or copyhold for lives or of any other tenure whatsoever."]

[Sect. 5 incorporates the interpretation clause in the former act, as to the words "person," "land," "tithes."

Stat. 2 & 3 Vict. c. 62.

Charges on tithes merged.

[By the stat. 2 & 3 Vict. c. 62, s. 1, it is provided, that charges on tithes which have been merged shall be charges upon the lands in priority to any other charge on the lands. Sect. 2 authorizes the party effecting the merger, with the consent of the Tithe Commissioners, to apportion the charge on a specific part of the lands, or on other lands belonging to him in the same parish, being in the opinion of the commissioners of at least three times the value of the charge. Sect. 6 extends the provisions of the former acts as to merger, to cases where the tithe or rent-charge and the land (whether glebe land or not) both "belong to the same person in virtue of his benefice, or of any dignity, office, or appointment, held by him." By sect. 7, in cases of merger of tithes or rent issuing out of copyholds subject to arbitrary fine, the commissioners are to indorse on the deed of merger a certificate under their hands and seal of the annual value of the tithes or rent-charge so merged, to be ascertained by them by such means as they shall think fit, and all future assessments of fines on the land are to be made as if they were still

Merger of tithes in glebe lands, &c.

Arbitrary fines on copyholds after merger of tithes.

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subject to the tithes or rent-charge; "and the production of such deed, declaration, or instrument of merger, or of a duplicate thereof with such certificate endorsed, or of an office copy of such deed, declaration, or instrument and certificate endorsed thereon, shall be sufficient evidence of the annual value of such tithes or rent-charge."]

[The following form of declaration merging tithes by a separate instrument, under the 6 & 7 Will. 4, c. 71, was issued by the Commissioners:—

Form of declaration merging tithes.

"KNOW ALL MEN by these presents, I ——, of &c., being lawfully seised of an estate in possession in fee-simple (*or*, in fee tail) in the tithes (*or*, rent-charge, *if the declaration is made after an agreement for a rent-charge*) issuing from or arising upon (*or*, charged upon, *if it be a rent-charge*) the lands hereinafter described, situate in the parish of ——, in the county of ——, that is to say, (*here describe the lands fully and accurately*), Do hereby declare it to be my will and intent, that the said tithes (*or*, rent-charge) shall henceforth be absolutely merged and extinguished in the freehold and inheritance of the said lands, according to the provision in that behalf contained in a statute made in the reign of his Majesty King William the Fourth, intituled 'An Act for the commutation of tithes in England and Wales;' IN TESTIMONY whereof I have hereunto subscribed my name, and affixed my seal this —— day of ——."

The commissioners recommend, that, where, at the time of the commutation, the rent-charge is intended to be merged, in order to save expense, and for the better preservation of the evidence of the merger, the declaration should be inserted into the agreement for commutation itself.]

79. RELEASE IN FEE, ON THE PURCHASE OF A REMAINDER, AND TRANSFER OF MORTGAGES.

79. RELEASE *in* FEE, *on the* PURCHASE *of a* REMAINDER *in Fee expectant on an Estate for Life, subject to certain* MORTGAGES *affecting the entire Inheritance, (including the* ESTATE *in* POSSESSION), *and which are paid off by the Purchaser, but are assigned to Trustees for him, to be kept on foot as against the Tenant for Life* (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, ——, BETWEEN [*trustee for first mortgagee*], of &c., of the first part; [*executors of first mortgagee*], of &c., executors named

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Remarks on the precedent in the text.

(*a*) The incumbrances are here kept on foot in order to be made available during the life of the tenant for life, for which period the purchaser is entitled to receive the interest on the principal sums in the character of mortgagee. On the decease of the tenant for life, his remainder falls into possession, and he, of course, takes the entire income as absolute owner. In the converse case of a tenant for life paying off mortgages affecting the inheritance, the incumbrances are in like manner preserved from extinguishment, in order that the tenant for life may be entitled to stand in the relation of mortgagee, with respect to the reversion or remainder. As this is a case of frequent occurrence in practice, the Editor had intended to furnish a precedent adapted to it under the title TRANSFERS OF MORTGAGES, but he was prevented from doing so by the consideration that the instrument had no other peculiarity than that the mortgage is transferred to a trustee for the tenant for life, instead of being vested in himself, a precaution which is particularly to be attended to if the mortgage were for a term; because such term, if vested in the tenant for life himself, would merge in his estate for life, and it would be inferred from his extinguishing the term, that he intended to exonerate the estate. See *St. Paul* v. *Viscount Dudley & Ward*, 15 Ves. 173. On this subject, vide ante, p. 212; 1 Pow. Mortg. by Coventry, 316; Patch, Mortg. 240. The obvious dictate of prudence in these cases is *explicitly to declare the intention.*

It will be observed, that, in the precedent in the text, the first mortgagee's term of five hundred years is assigned to a trustee for the purchaser, for the purpose of being held as a subsisting unsatisfied mortgage term, during the life of the tenant for life, and afterwards of attending the inheritance. The inheritance expectant on that term which was vested in a trustee for the first mortgagee, is conveyed to the limitations affecting the equity of redemption. By limiting the remainder in fee-simple to the purchaser, the dower of his wife, when the remainder fell into possession, would have been let in.

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in the last will and testament of [*first mortgagee*], late of ——, aforesaid, of the second part; [*second mortgagee*], of &c., of the third part; [*vendor*], of &c., only son of [*tenant for life*], of ——, widow of the fourth part; [*purchaser*], of &c., of the fifth part; [*dower trustee*], of &c., of the sixth part; and [*trustees of term*], of &c., of the seventh part. WHEREAS, by indenture bearing date the 24th day of June, 1810, and made between [*late owner*], since deceased, of the one part, and the said [*first mortgagee*], deceased, of the other part, in consideration of the sum of 900*l.* to the said [*late owner*] paid by the said [*first mortgagee*], the said [*late owner*] did demise the hereditaments hereinafter described and intended to be hereby released unto the said [*first mortgagee*], his executors, administrators, and assigns, for the term of five hundred years, from the day next before the day of the date of the now reciting indenture, subject to a proviso for making void the same term on payment to the said [*first mortgagee*], his executors, administrators, or assigns, of the sum of 900*l.*, with interest for the same after the rate of 5*l.* per centum per annum, on the —— day of —— then next ensuing. AND WHEREAS, by indentures of lease and release, bearing date the 21st and 22nd days of February, 1816, the release being made between the said [*late owner*], of the first part; [R. S.], of ——, sister of the [*late owner*] (*b*), of the second part; the said [*first mortgagee*], of the third part; and the said [*trustee for first mortgagee*], of the fourth part; the said hereditaments hereinafter described and comprised in the hereinbefore in part recited indenture, were, in consideration of the further sum of 350*l.*, advanced by the said [*first mortgagee*] to the said [*late owner*], conveyed and assured (subject to the aforesaid term of five hundred years) to the use of the said [*trustee for first mortgagee*], his heirs and assigns, for ever, *In trust* for the said [*first mortgagee*], his heirs and assigns (*c*); and subject to a proviso, that, upon payment by the said [*late owner*], or the appointees, heirs, and assigns of the said [*present tenant for life*], unto the said [*first mortgagee*], his executors, adminis-

Recital of mortgage to first mortgagee for five hundred years, for securing 900*l.* and interest.

Recital of mortgage in fee, for securing further sum of 350*l.*

(*b*) This lady was the present tenant for life, who will hereafter be referred to under that appellation.

(*c*) The first mortgage having been for a term made to the mortgagee himself, this mortgage, which is in fee, is vested in a trustee, in order to prevent a merger of the term.

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trators, and assigns, of the said sum of 900*l.* on demand, and of the said sum of 350*l.* on the 21st day of July then next, with interest for the same sums respectively, after the rate of 5*l.* per centum per annum, the said [*trustee for first mortgagee*], his heirs and assigns, and also the said [*first mortgagee*], his heirs, executors, administrators, and assigns, would, at the request and charges of the said [*present tenant for life*], her heirs or assigns, convey the said hereditaments to the use of the said [*present tenant for life*], her heirs and assigns, for ever (*d*).

Death of late owner.

AND WHEREAS the said [*late owner*] died on or about the 10th day of May, in the year 1816.

Further charge for securing 450*l.* to same mortgagee.

AND WHEREAS, by an indenture, bearing date the 10th day of July, 1816, and made between the said [*present tenant for life*], of the first part; the said [*first mortgagee*], of the second part; and the said [*trustee for first mortgagee*], of the third part; in consideration of the further sum of 450*l.* to the said [*present tenant for life*] advanced and paid by the said [*first mortgagee*], she the said [*present tenant for life*] did convey and assure the said hereditaments to the use of the said [*trustee for first mortgagee*], his heirs and assigns, Upon trust for securing to the said [*first mortgagee*], his executors, administrators, and assigns, the payment of the said sum of 450*l.*, with interest for the same after the rate of 5*l.* per centum per annum, as fully and effectually, to all intents and purposes, as the said several principal sums of 900*l.* and 350*l.*, and the interest thereon respectively, were secured.

Conveyance to the present vendor of a remainder in fee, expectant on an estate for life, limited to his mother, the donor.

AND WHEREAS, by indentures of lease and release, bearing date respectively the 22nd and 23rd days of March, 1820, the release being made between the said [*present tenant for life*], of the first part; the said [*vendor*], therein described as the only son of the said [*tenant for life*], of the second part; and [A. B.], of the third part; It is witnessed, that, in consideration of the natural affection which she bore to her son, the said [*vendor*], and the nominal consideration therein mentioned, she, the said [*tenant for life*], did grant, release, and confirm the said heredita-

(*d*) Here the ownership in the equity of redemption is changed by the terms in which the right of redemption is limited by the proviso. In such cases, the intention to change the ownership should be clearly expressed by recital; though I am not aware of any case that has gone the length of saying that the giving a right of redemption to a person who had previously *no* interest, as seems to be the case here, would not be sufficient of itself to change the property.

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ments, (subject to the aforesaid incumbrances), unto the said [A. B.], his heirs and assigns, for ever, To the use of the said [*tenant for life*], during her life, without impeachment of waste, with remainder (*to uses to prevent dower in favour of vendor*). AND WHEREAS, by indenture, bearing date the 10th day of October, 1820, and made between the said [*tenant for life*] and [*vendor*], of the one part, and the said [*second mortgagee*], of the other part, in consideration of the sum of 250*l.* to the said [*tenant for life*] and [*vendor*] paid by the said [*second mortgagee*], They the said [*tenant for life*] and [*vendor*] Did demise the said hereditaments (subject to the payment of the said several sums of 900*l.*, 350*l.*, and 450*l.*, and interest, due to the said [*first mortgagee*], and secured as aforesaid, unto the said [*second mortgagee*], his executors, administrators, and assigns, for the term of one thousand years, upon such trusts as are therein declared, for securing the payment unto the said [*second mortgagee*], his executors, administrators, and assigns, of the said sum of 250*l.*, and interest. AND WHEREAS the said [*first mortgagee*] departed this life on or about the 30th day of March, 1820, having duly made and published his last will and testament in writing, dated the 6th day of December, 1809, and thereof appointed the said [*executors*] executors, who have duly proved the same will in the Prerogative Court of Canterbury. AND WHEREAS the said several principal sums of 900*l.*, 350*l.*, and 450*l.*, making together the sum of 1,700*l.*, still remain due and owing to the said [*executors*], as executors of the said [*first mortgagee*], upon or by virtue of the said several mortgage securities hereinbefore mentioned to have been made to the said [*first mortgagee*]. And the said principal sum of 250*l.* still remains due and owing to the said [*second mortgagee*], upon or by virtue of the said indenture of the 10th day of October, 1820. But all interest for the said several mortgage debts has been paid to the said [*executors*] and the said [*second mortgagee*] respectively, as they do hereby respectively acknowledge. AND WHEREAS [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the remainder or reversion in fee-simple, expectant on the decease of the said [*tenant for life*], of and in the said hereditaments hereinafter described, subject to the said sums of 900*l.*, 350*l.*, and 450*l.*, secured to the said [*first mortgagee*] and now due to his executors as aforesaid, and to the said sum of 250*l.* secured to the said [*second mortgagee*] as aforesaid, and the

Recital of mortgage to second mortgagee (subject to former mortgages) for one thousand years, for securing 250*l.* and interest.

Death of first mortgagee, and appointment of executors.

That all said principal sums remain due to executors of first mortgagee.

And said principal sum of 250*l.* to second mortgagee.

Contract for purchase of remainder in fee, subject to incumbrances.

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interest henceforth to become due on the same sums respectively, at or for the price or sum of £——. AND WHEREAS the said [*purchaser*], at the request of the said [*executors*], as executors as aforesaid, and the said [*second mortgagee*], and with the consent of the said [*vendor*], hath agreed to advance unto the said [*executors*] the said several sums of money, amounting together to the sum of 1700*l.*, and unto the said [*second mortgagee*] the said sum of 250*l.* respectively secured to them as aforesaid, upon having the said several sums of 900*l.*, 350*l.*, 450*l.*, and 250*l.*, respectively secured by the several hereinbefore-recited indentures, and the interest henceforth to become due in respect of the same respectively, assigned unto the said [*trustees of term*], their executors, administrators, and assigns, *In trust* for the said [*purchaser*], and to the intent that the same may, for all ends, intents, and purposes whatsoever, be respectively kept on foot as subsisting charges upon the said purchased hereditaments; and particularly that the said [*purchaser*], his executors, administrators, and assigns may be authorized and enabled to recover and receive the interest henceforth during the life of the said [*tenant for life*] to become due and payable upon or in respect of the same sums respectively.

Agreement to pay off said mortgages, on having said term assigned to trustees to secure the interest from tenant for life.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of 1700*l.* of lawful British money, to the said [*executors*], as executors as aforesaid, paid by the said [*purchaser*] at or before the sealing and delivery of these presents, the receipt whereof the said [*executors*] do hereby respectively acknowledge, and from the same do release and discharge the said [*purchaser*], his executors, administrators, and assigns, for ever, the said [*executors*], with the consent of the said [*vendor*], and by the direction of the said [*purchaser*], testified by their severally executing these presents *Do*, and every of them *Doth*, bargain, sell, assign, transfer, and set over, by these presents, unto the said [*trustees of term*], their executors, administrators, and assigns, ALL THOSE the said several sums of 900*l.*, 350*l.*, and 450*l.*, respectively secured to or for the benefit of the said [*first mortgagee*], in and by the said indentures of the 24th day of June, 1810, the 22nd day of February, 1816, the 10th day of July, 1816, and the 23rd day of December, 1816, as hereinbefore mentioned, and the full benefit and advantage thereof, and the interest henceforth to become due and payable upon or in respect of the same several sums: And all the right, interest, property,

Executors of first mortgagee assign to trustees for purchaser—

—mortgage debts.

And all the right, &c.

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claim, and demand whatsoever of the said [*executors*] respectively in, to, and out of the same sums of money respectively, and interest, together with all powers, remedies, and means whatsoever requisite and necessary for the suing for, recovery, receiving, and giving effectual discharges for the same sums of money respectively. To HAVE, RECEIVE, AND TAKE the said several sums of money, interest, and premises expressed to be hereby bargained, sold, and assigned unto the said [*trustees of term*], their executors, administrators, and assigns, In trust nevertheless for the said [*purchaser*], his executors, administrators, and assigns, and to be assigned and disposed of as he or they shall, from time to time, direct or appoint. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the sum of 250*l.* of lawful British money to the said [*second mortgagee*] paid by the said [*purchaser*] at or before the sealing and delivery of these presents, the receipt whereof the said [*second mortgagee*] doth hereby acknowledge, and from the same doth release and discharge the said [*purchaser*], his executors, administrators, and assigns, for ever, the said [*second mortgagee*], with the consent of the said [*vendor*], and by the direction of the said [*purchaser*], testified as aforesaid, *Doth*, by these presents, bargain, sell, assign, transfer, and set over, unto the said [*trustees of term*], their executors, administrators, and assigns, All that the said sum of 250*l.* secured by the said indenture of the 10th day of October, 1820, as hereinbefore mentioned, and the full benefit and advantage thereof, and the interest henceforth to become due and payable upon or in respect of the same; And all the right, &c., Together with all powers, &c., To HAVE, RECEIVE, AND TAKE the said sum of money, interest, and premises lastly expressed to be hereby bargained, sold, and assigned, unto the said [*trustees of term*], their executors, administrators, and assigns, In trust nevertheless for the said [*purchaser*], his executors, administrators, and assigns, and to be assigned and disposed of as he or they shall from time to time direct or appoint. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the premises, and of the sum of 10*s.* of lawful British money, to the said [*executors of first mortgagee*] already paid by the said [*trustees of term*], the said [*executors*], with the consent of the said [*vendor*], and by the direction of the said [*purchaser*], testified as aforesaid, *Do*, and every of them *Doth*, by these pre-

Habendum

to trustees,

in trust for purchaser.

Second testatum.

Second mortgagee assigns his mortgage-debt.

Habendum

to trustees,

in trust for purchaser.

Third testatum.

Executors of first mortgagee assign mortgaged hereditaments.

79. RELEASE IN FEE, ON THE PURCHASE OF A REMAINDER, AND TRANSFER OF MORTGAGES.

sents, sell, assign, transfer, and set over, unto the said [*trustees of term*], their executors, administrators, and assigns, *All and singular* the messuage, barton, farm, lands, mills, tenements, tithes, and other the hereditaments comprised in the said indenture of the 24th day of June, 1810, and hereinafter described, with their respective rights, members, and appurtenances; And all the estate, right, title, interest, property, claim, and demand whatsoever of the said [*executors*] respectively, in, to, and out of the same. TO HAVE AND TO HOLD the said hereditaments, and premises hereby bargained, sold, and assigned, or expressed and intended so to be, unto the said [*trustees of term*], their executors, administrators, and assigns, henceforth for and during all the rest, residue, and remainder of the term of five hundred years expressed to be granted and demised by the said indenture of the 24th day of June, 1810, and for all other the estate, term, and interest (if any) of the said [*executors*], *Upon trust* for the said [*purchaser*], his executors, administrators, or assigns, subject nevertheless to such right and equity of redemption, as the same premises are now subject and liable to, upon payment as well of the said several sums of 900*l.*, 350*l.*, and 450*l.*, and the interest thereof respectively, as of the said sum of 250*l.* and the interest thereof. PROVIDED ALWAYS, and it is hereby agreed and declared, that if, at the decease of the said [*tenant for life*], the said [*purchaser*], his executors, or administrators, shall be beneficially entitled to the said several sums of 900*l.*, 350*l.*, 450*l.*, and 250*l.*, respectively, and the absolute interest therein respectively, and the said [*purchaser*], or his heirs, shall be seised of or beneficially interested in the equity of redemption, and the reversion and remainder in fee-simple of the said hereditaments and premises, then, from and after the decease of the said [*tenant for life*], and as between the real and personal representatives of the said [*purchaser*], the said [*trustees of term*], their executors, administrators, and assigns, shall stand possessed of and interested in the said hereditaments, and premises, for the then residue of the said term of five hundred years therein, and of and in the said several sums of 900*l.*, 350*l.*, 450*l.*, and 250*l.*, respectively, and the interest thereof respectively, *In trust* for and by way of protection to the said [*purchaser*] and his heirs, and to be from time to time assigned and disposed of as he or they shall direct or appoint, and in the meantime to attend, wait upon, and go along with the re-

Habendum

to trustees for remainder of said term of 500 years, subject to redemption.

Declaration that mortgages shall attend the inheritance after the death of the tenant for life;

In trust for purchaser, and to attend the inheritance.

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version, freehold, and inheritance of the same hereditaments, in order to preserve the same from all mesne charges and incumbrances, if there should be any such. (*Covenant by executors of first mortgagee that they have not incumbered, ut ante, p.* 249). AND THIS INDENTURE FURTHER WITNESSETH, that, in pursuance of the said contract for the purchase of the said reversion or remainder of and in the said hereditaments and premises, subject as aforesaid, and in consideration of the sum of £——, of lawful British money, to the said [*vendor*] paid by the said [*purchaser*], at or before the sealing and delivery of these presents, the receipt of which sum of £—— the said [*vendor*] doth hereby acknowledge, and from the same doth release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, for ever by these presents, And also in consideration of the sum of 10*s.* of lawful money aforesaid, to the said [*trustee for first mortgagee*] already paid by the said [*purchaser*], he the said [*trustee for first mortgagee*], at the request and by the direction of the said [*executors*], [*second mortgagee*], and [*vendor*], (testified by their severally executing these presents), *Doth*, by these presents, bargain, sell, and release, And to the intent that the residue now unexpired of the said term of one thousand years, so granted or demised to the said [*second mortgagee*] as hereinbefore mentioned, may be merged or otherwise extinguished in the reversion and inheritance of the said hereditaments and premises therein comprised (*e*), he the said [*second mortgagee*], at the request and by the direction of the said [*vendor*] and [*purchaser*], (testified as afore-

Further testatum.

In consideration of purchase-money, and for nominal considerations, trustee for first mortgagee, (by the direction of executors and vendor), and second mortgagee, to the intent that his term may merge, surrenders,

(*e*) This is a mere equitable term, the whole legal inheritance having been vested in the trustee for the first mortgagee, and therefore no object would have been answered by keeping it on foot. In truth, there being no legal term in the surrenderor, the deed is inoperative as a surrender properly so called; but the taking a surrender of such an interest accords with the frame of the mortgage-deed, which assumed the form of an actual demise or lease and not of a mere contract or agreement to charge only, which is its real nature; and is consistent moreover with the general system of conveyancers in transferring equitable interests by the modes of assurance adapted to legal estates of the same quantity. Thus, it is in every day's practice for the mortgagee of an equitable inheritance, on the satisfaction of the debt, to execute indentures of lease and release, professedly to reconvey the estate, and for the mortgagee of an equitable term to execute a deed of surrender; though in both these instances the deeds operate merely as a discharge from the equitable lien or contract created by the mortgage, for which purpose a receipt in full for the mortgage money would be equally effective.

Remark upon the surrender.

79. RELEASE IN FEE, ON THE PURCHASE OF A REMAINDER, AND TRANSFER OF MORTGAGES.

said), *Doth*, by these presents, bargain, sell, assign, surrender, and yield up; And the said [*vendor*] *Doth*, by these presents, made, &c., (*ut ante, p.* 72, *and see p.* 205), grant, bargain, sell, release, and confirm unto the said [*purchaser*], and to his heirs, ALL (*parcels and general words, ut ante, p.* 73). TO HAVE AND TO HOLD the said hereditaments, and all and singular other the premises hereinbefore described and expressed to be hereby granted and released, unto the said [*purchaser*] and his heirs, To THE USE of the said [*trustees of term*], their executors, administrators, and assigns, henceforth, during the residue now to come and unexpired of the aforesaid term of five hundred years, expressed to be granted or demised, by the said indenture of the 24th day of June, 1810, as aforesaid, and by way of corroboration and confirmation of the same, and subject to such right and equity of redemption as aforesaid, upon payment of the said principal sums of 900*l.*, 350*l.*, 450*l.*, and 250*l.*, respectively, and the interest thereof respectively, under the proviso aforesaid. And after the end or sooner determination of the said term of five hundred years, and in the meantime subject thereto, To THE USE of the said [*tenant for life*] and her assigns, during the term of her natural life, without impeachment of waste; and from and after her decease, (*To uses to prevent dower in favour of the purchaser, ut ante, p.* 73. *Covenant by trustee for first mortgagee, and second mortgagee, that they have not incumbered, ut ante, p.* 75). AND the said [*vendor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*purchaser*], and his heirs, in manner following, (that is to say), that, notwithstanding any act, deed, matter or thing whatsoever, made, executed, done, or suffered by the said [*vendor*], or the said [*tenant for life*], or [*former owner*] (*f*) respectively, to the contrary, the said [*trustee for first mortgagee*], [*second mortgagee*], and [*vendor*], or some or one of them, now at the time of the sealing and delivery of these presents, have or hath in themselves or himself good right, full power, and

Parcels.

Habendum,

to purchaser in fee.

Nevertheless to said trustees for the remainder of said term of 500 years;

—subject to equity of redemption.

Remainder.

To the use of tenant for life.

Remainder to uses in favour of purchaser.

Covenant by vendor, that conveying parties have right to convey.

As to the covenants for title.

(*f*) As the vendor derived the property from his mother, (the present tenant for life), who entered into no covenants for title with him, the conveyance being merely voluntary, it seems proper that the covenants of the vendor for the title should extend to her acts: and since the mother was the donee of the preceding owner, it seems proper, for the same reason, that they should extend to his acts also.

79. RELEASE IN FEE, ON THE PURCHASE OF A REMAINDER, AND TRANSFER OF MORTGAGES.

lawful and absolute authority, to grant, release, surrender, and assure the hereditaments, and premises, expressed to be hereby granted and released, To the uses and in manner hereinbefore mentioned, and according to the true intent and meaning of these presents; *And further*, that it shall be lawful for the said [*purchaser*], his appointees, heirs, and assigns, from time to time, and at all times after the decease or sooner determination of the estate for life of the said [*tenant for life*], to hold and enjoy the said hereditaments and premises, without any interruption or disturbance whatsoever, of, from, or by the said [*vendor*], or of, from, or by any other person or persons whomsoever, claiming through, under, or in trust for him, or through, under, or in trust for the said [*tenant for life*] and [*former owner*], deceased, respectively, other than and except the person or persons whose estate or interest, or several estates or interests, is or are hereinafter excepted, for or in respect of the same estate and interest, or several estates and interests; And that free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said [*vendor*], his heirs, executors, or administrators, well and sufficiently saved and kept harmless and indemnified of, from, and against all and all manner of former and other estates, titles, charges, and incumbrances whatsoever, made, done, committed, occasioned, or executed by the said [*vendor*], or by any person or persons whomsoever, claiming through, under, or in trust for the said [*tenant for life*] and [*former owner*] respectively, deceased, or by or through the acts, defaults, means, privity, or procurement, of them or of any of them, (Save and except a certain indenture of lease, bearing date &c., and made between &c., whereby the said messuage, barton, and farm, with the appurtenances called ——, (except certain parts thereof in the said lease excepted), were demised to the said [*lessee*], his executors, administrators, and assigns, for a term of fourteen years from Lady-day then next, at the yearly rent of £——, payable quarterly, and under divers covenants and conditions in the same indenture of lease contained); *And moreover*, that the said [*vendor*] and his heirs, and all and every person and persons claiming any estate, right, title, or interest in, to, or out of the said hereditaments and premises, or any of them, through, under, or in trust for the said [*tenant for life*] and [*former owner*] respectively, will and shall from time to time, and at all times hereafter, upon every reasonable request, and at the costs

For quiet enjoyment;

—free from incumbrances;

(exception of lease at rack-rent);

—and for further assurance.

79. RELEASE IN FEE, ON THE PURCHASE OF A REMAINDER, AND TRANSFER OF MORTGAGES.

and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, and execute, or cause to be made, done, and executed, All such further acts, deeds, matters, and things, conveyances and assurances in the law whatsoever, for the more effectually granting, releasing, and assuring the said hereditaments and premises with their appurtenances, subject to the life estate of the said [*tenant for life*] if subsisting, unto and to the use of the said [*purchaser*], his appointees, heirs, and assigns, for ever, or otherwise, as he or they shall direct or appoint, As by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel in the law, shall be advised or devised and required, so that &c. (*ut ante, p.* 77). IN WITNESS &c.

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80. IN CONSIDERATION OF FEE-FARM RENT.

80. APPOINTMENT *and* RELEASE *in* FEE, *in Consideration of a perpetual* RENT-CHARGE *issuing out of the Lands, which is limited to* USES *to* PREVENT DOWER *in favour of the Vendor* (*a*). *Covenant to build, repair, and insure, &c. Variations containing Forms of* RESERVATIONS *of* TIMBER *and of* MINERALS.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; [*vendor's trustee*], of &c., of the second part; [*purchaser*], of &c., of the third

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As to the expense of the deed, where lands are sold in consideration of a rent-charge.

(*a*) Where lands are sold in consideration of a rent issuing out of them for the benefit of the vendor, it should always be stipulated by whom the expense of the conveyance is to be borne; for, as the vendor takes an interest under the limitations, it does not follow that the rule which throws this expense upon the purchaser in ordinary cases, would apply to this. A question also frequently arises between the solicitors of the respective parties to a conveyance of this nature, as to which of them is entitled to prepare the deed, it being of an amphibious character, partly in the nature of a purchase-deed, which it is well known is always prepared by the purchaser's solicitor, and partly of a lease, which is invariably prepared by the lessor's solicitor. The object of the rule which assigns to a purchaser the expense of preparing his conveyance, and to his solicitor the task of preparing, must have been that the purchaser may mould his conveyance in his own way; but in the present instance, as the vendor also takes an interest in the property, namely, the rent, the limitation of which he must wish to regulate, the reason applies equally to him. In such cases it seems fair that the expense should be borne by the parties equally, and the business jointly transacted by the solicitors.

80. IN CONSIDERATION OF FEE-FARM RENT.

part; and [*purchaser's trustee*], of &c., of the fourth part. (*Recite deeds of conveyance limiting the property, with other hereditaments, to the ordinary uses for preventing dower, in favour of the vendor*). AND WHEREAS the said [*vendor*] hath contracted and agreed with the said [*purchaser*] to convey and assure to him the hereditaments hereinafter described, and intended to be hereby appointed and released, for an estate of inheritance in fee-simple, free from all incumbrances (*b*), in consideration of the annual sum or yearly rent-charge hereinafter limited to the use of or in trust for the said [*vendor*], his appointees, heirs, and assigns; And also in consideration of the said [*purchaser*] entering into the covenants hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of the annual sum or rent-charge of £——, hereinafter limited to uses for the benefit of the said [*vendor*], his appointees, heirs, and assigns, to be issuing and payable out of the piece or parcel of ground and hereditaments hereinafter described, and of the powers and remedies hereby reserved for enforcing the payment of the same; And also in consideration of the covenants on the part of the said [*purchaser*] hereinafter contained, he, the said [*vendor*], by virtue of the hereinbefore recited power, and of every other power enabling him in this behalf, *Doth*, by these presents, direct, limit, and appoint, that the hereditaments hereinafter described, and intended to be hereby released, shall (*c*) henceforth remain, continue, and be *To the uses*, upon the trusts, and for the intents and purposes hereinafter expressed and declared concerning the same. AND THIS INDENTURE FURTHER WITNESSETH, that, for the considerations hereinbefore expressed, and by way of auxiliary assurance only, And also in consideration of 10*s.* by the said [*purchaser*] to the said [*vendor*] already paid, he, the said [*vendor*], *Doth*, by these presents, made &c., (*ut ante, p.* 72), grant, bargain, sell, and release, unto the said [*purchaser*] and his heirs, (*parcels and general words*). And all the estate, &c. (*d*)

Recital of contract for conveyance.

Testatum.

In consideration, &c., vendor appoints to the uses after mentioned.

Further testatum.

Vendor grants to purchaser.

(*b*) "(But with the savings, exceptions, and reservations hereinafter contained)."

(*c*) "(But subject always to the savings, exceptions, and reservations hereinafter expressed and contained)."

(*d*) ["SAVE AND EXCEPT and always reserved out of these presents, and the grant and release hereby made, unto the

Exception of timber, &c.

80. IN CONSIDERATION OF FEE-FARM RENT.

And all deeds, &c. (*e*). To HAVE AND TO HOLD the said lands and hereditaments hereinbefore described, and other

Habendum.

said [*vendor*], his heirs, and assigns, all and all manner of timber trees, and trees likely to become timber, and all other trees, saplings, and wavers, which are now standing or growing and being, or which shall or may at any time or times hereafter stand or grow and be in or upon the said hereditaments and premises, or any part thereof: With free liberty of ingress, egress, and regress, way, and passage, to and for the said [*vendor*], his heirs and assigns, and each or any of them, with servants, workmen, teams, waggons, carts, and carriages, or otherwise, at all seasonable times in the year, to come into and upon and out of the said hereditaments and premises, or any part thereof, to cut down, hew out, lop, top, work out, make up, convert, and carry all or any of the said timber trees, lops, tops, and boughs, hereby excepted as aforesaid, making and

As to custody of the title-deeds.

(*e*) In such a case as the present, the deeds are commonly delivered to the grantee of the land; but it seems proper that the grantor, who, as the cestui que use of the rent, retains an interest in the property, should have a covenant for their production. Sometimes, indeed, the deeds are left in the hands of the vendor, who covenants to produce them to the purchaser; and this, of course, is done where they relate to other property. In such a case, a memorandum of the present deed should be indorsed on the deed of conveyance vesting the property in the vendor, or the person from whom he derived his title; because, where a person is allowed to hold a deed which makes him the ostensible owner of a larger estate than, according to the existing facts, belongs to him, it is always proper to indorse upon the deed some notice of the subsequent transactions which have curtailed or qualified his estate, in order to preclude the possibility of any improper use being made of the deed. Attention to this precaution would often prevent fraud. The most frequently occurring cases to which it is applicable are, where a person who has once been absolute owner of property afterwards holds the deeds in the character of mortgagee; and also, where a man, being seised in fee of lands, settles them, upon his marriage, to uses, under which he takes an estate for life only. In this case, the custody of the deeds belongs to him, as the owner of the immediate freehold. Unless, in both these instances, a memorandum of the subsequent deed, which restricts the absolute ownership of the holder of the deeds, be indorsed on the deed of conveyance under which that ownership is derived, the power is most improperly left in the hands of such person, of dealing with the property as his own inheritance, to the injury, perhaps ruin, of an innocent purchaser, who becomes the victim of a fraud against which no vigilance or circumspection could have protected him, since the possession of the property, in both cases, might, and in that of the tenant for life in all probability would, be consistent with the representation of absolute ownership.

the premises intended to be hereby released or otherwise assured unto the said [*purchaser*], and his heirs, to the uses, 80. IN CONSIDERATION OF FEE-FARM RENT.

paying reasonable compensation for any actual damage thereby occasioned."]

[See a form of exception of trees in a lease, ante, Vol. 4, p. 717, n.]

["SAVING, nevertheless, and always excepting and reserving unto the said [*vendor*], his heirs, and assigns, for ever, all and every the mines, beds, strata, seams, veins, nests, and bunches of coal, copper, tin, lead, and iron ores*, and all other metals, ores, and minerals whatsoever, whether opened or unopened, lying in or under the said lands, hereditaments, and premises, or any of them or any part thereof; With full liberty, power, and authority, to and for the said [*vendor*], his heirs, and assigns, by themselves and their agents and servants, from time to time, and at all times henceforth, for ever, to enter upon the said lands, hereditaments, and premises, or any parts or part thereof, and to break the surface thereof, and search for, win, work, take and carry away the said coal, metals, ores, and minerals, or any of them, and for that purpose to dig, sink, drive, and make pits, shafts, drifts, headways, levels, adits, air-gates, watercourses, soughs, trenches, buddles, fences, and sluices, and to erect, build, and make pumps, engines, furnaces, smelting-houses, stamping-mills, ore and store houses, sheds, hovels, and stables, and other erections, and to do all other things necessary or convenient, as well for working the said mines as for refining the metals and minerals, and carrying off and removing all the water, slag, rubbish, and other annoyances and troubles, from the works, and for the accommodation of the persons employed therein; With allowance also of sufficient heap-room and ground-room, for laying, placing, ordering, and dressing the ores, minerals, and metals, and that upon the most convenient parts of the said hereditaments and premises; And also liberty to make and set up, and use water-engines, and, Reservation of mines and minerals.

* [The geological reader will smile at this incongruous catalogue, and will be apt to regard it as the "rhapsody and effervescence of a dull and uningenious imagination." (Ed. Rev., vol. 45, p. 472). The association of coal with tin ore can, however, do no harm; and perhaps conveyancers may be excused if they decline to adopt even the most fashionable of geological doctrines as perfectly free from doubt. Of course, where the character of the strata is unknown to the draughtsman, he must necessarily resort to words fitted to include all kinds of minerals.]

80. IN CONSIDERATION OF FEE-FARM RENT.

upon the trusts, and for the intents and purposes hereinafter expressed concerning the same, (that is to say), TO THE USE,

To the intent that a yearly rent-charge shall issue.

if judged necessary, to turn, change, or alter the course of waters and rivulets within the said hereditaments; And also liberty of access, ingress, egress, and regress, and passage at all times to and for the said [*vendor*], his heirs, and assigns, and his and their servants and workmen, with or without horses, or other animals and carriages, and materials of all kinds; And liberty of making, repairing, or maintaining and using any railroads, or other roads or ways for all or any of the purposes aforesaid, of cutting and digging turf or peats, and of cutting and using brush or common wood for building or repairing any houses, hovels, and other offices belonging to or necessary for the said works; And all other necessary or convenient and reasonable powers, authorities, and privileges. PROVIDED ALWAYS, that the said [*vendor*], his heirs and assigns, shall, from time to time, pay and make reasonable compensation by way of damages to the owners or occupiers for the time being of the said hereditaments and premises, or any part thereof, for and in respect of the injuries and losses to be occasioned to them by the exercise and prosecution of all or any of the powers and authorities and works aforesaid."]

[The following shorter form is perhaps equally effectual:—

Short form of reservation of minerals.

"SAVING, nevertheless, and always excepting and reserving unto the said [*vendor*], his heirs and assigns, for ever, all mines and minerals whatsoever, lying within or under the said hereditaments and premises, or any part thereof, whether opened or unopened, with full liberty to and for the said [*vendor*], his heirs and assigns, and all persons employed by him or them from time to time and at all times for ever hereafter, by any temporary or permanent occupation or use of any part of the surface or of any other part of the said hereditaments and premises, and by all usual and convenient ways and means, to work, procure, win, separate, smelt, refine, and take away the said mines and minerals or the produce thereof, and for that purpose to construct and use all convenient engines, works, rail and other roads, watercourses, matters and things, in the same manner in all respects as is usually done by the owners or lessees of similar mines or minerals in any part of England, but always making and paying reasonable compensation for all damages and losses to be occasioned thereby."]

intent, and purpose that an annual sum, or rent-charge of £——, to be payable and paid as hereinafter mentioned,

80. IN CONSIDERATION OF FEE-FARM RENT.

Exception of coal mines and quarries.

["SAVE AND EXCEPT, and always foreprized and reserved to the said [*vendor*], his heirs and assigns for ever, from, forth, and out of the said hereditaments and premises hereby conveyed, (other than and except the wood and ground aforesaid), all and every the collieries, and coal and iron mines, and seams, strata, and veins of coal, and iron stone, and iron ore, as well opened as not opened, within and under the same and every or any of them, and all other mines and quarries whatsoever, with sufficient heap-room, pit-room, and all other necessary or convenient rooms for the winning, working, obtaining, and getting of coal, stone, or other minerals from, forth, or out of the same and every or any of them, or in or about the management or carrying on thereof, or the draining or lifting up of water from, forth, or out of the same by means of drifts, levels, steam and other engines and machinery, or otherwise howsoever; *And also* liberty to erect steam or other engines, houses, engine-houses, stables, shops, stone-houses, hovels, or sheds, for the habitation or use of workmen or agents employed in or about the said works, as also for the standing and placing of the horses and materials to be used and employed therein; *And also* free way, leave, and passage for horses, carts, wains, waggons, and other carriages, and the conductors and drivers thereof, as well for the carrying, leading, and conveying of coals and other materials from the said collieries or coal mines whatsoever, through, over, and along any of the lands or grounds hereby released and conveyed (except as is before excepted) the nearest and most convenient way or ways to or towards the rivers of Tyne, &c., or any of them; *And also* all trunks, hell-room, and hell-berth, made, built, or placed in and upon any parts of the said hereditaments and premises; *And also* all and every rail, waggon, and other ways and branches, cuts and canals, already made, laid out, or used in, over, or along the said premises, (except as aforesaid), or any part or parcel of them, or any of them, with liberty to amend and repair the same; *And also* liberty of making and laying any other rail, waggon, or other ways and branches, cuts and canals, and of mending and repairing the same, and of erecting and making of bridges, mounds, or cuts, for the perfecting and finishing

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clear of and free from all charges and deductions whatsoever on account of taxes or otherwise, may henceforth and for ever hereafter issue out of the said lands, hereditaments, and premises, and be received and taken by the person or persons for the time being entitled to the said annual sum or rent-charge, under or by virtue of the uses hereinafter expressed and declared concerning the same, such annual sum or rent-charge to be payable and paid in even and equal portions quarterly, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year, the first quarterly payment to be made on the 25th day of March next. AND TO THIS FURTHER USE, intent, and purpose, that, so often as any quarterly payment of the said annual sum or rent-charge of £——, or any part thereof, should be behind and unpaid by the space of fourteen days next after any of the days or times appointed for payment thereof as aforesaid, it shall be lawful for the person or persons for the time being entitled to the same annual sum or rent-charge, under or by virtue of the uses or limitations hereinafter expressed concerning the same, into and upon the said lands, hereditaments, and premises, or any part thereof, to enter and distrain for the same annual sum or rent-charge, and all arrears thereof; and the distress and distresses then and there found to take, drive, carry away, and impound, and the same in pound to detain, and in due time to appraise and sell, or otherwise to act therein, according to due course of law, in the same manner as landlords are authorised to do in respect to distresses for arrears of rent upon leases for years; to the intent, that thereby and therewith the person or persons for the time being entitled as aforesaid, shall be fully paid and satisfied the said annual sum or rent-charge of £——, or so much thereof as shall then remain due and

Power of distress.

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of such rail, waggon, or other ways, cuts, and canals, and to dig and get stones, sand, and clay for that purpose, and do all other things necessary or convenient in or about the same."]

[As to the law respecting mines, vide ante, Vol. 4, p. 663, et seq., *Blakesley* v. *Whieldon*, 1 Hare, 176; and as to various technical terms and points, see pp. 658, 662, 675, 677, 683, 684, 686, 689, 701, 702, 710, and 728, in the same volume. And see now Mr. Bainbridge's valuable Treatise on The Law of Mines.]

unpaid, and all costs and expenses whatsoever occasioned by the non-payment thereof. AND TO THE FURTHER USE, intent, and purpose, that, so often as any quarterly payment of the said annual sum or rent-charge, or any part thereof, shall be behind and unpaid by the space of twenty-eight days next after any of the said days or times appointed for the payment thereof as aforesaid, although no formal demand thereof shall have been made, it shall be lawful for the person or persons for the time being entitled to the said annual sum or rent-charge, under or by virtue of the uses or limitations hereinafter expressed and declared concerning the same, into and upon the said lands, hereditaments, and premises, or any part thereof in the name of the whole, to enter, and the same to hold and enjoy, and the rents and profits thereof to receive and take, for his, her, and their own use and benefit, until he, she, or they shall be thereby, or therewith, or otherwise, fully paid and satisfied all arrears of the said annual sum or rent-charge, and also so much of the said annual sum or rent-charge as shall accrue and grow due during such time as the person or persons for the time being entitled as aforesaid shall continue in possession of the said land, hereditaments, and premises, after such entry as aforesaid; together with all such damages, costs, and expenses whatsoever as shall be occasioned by reason of the non-payment thereof, or of any part thereof, at or on the days appointed for the payment thereof as aforesaid; and such possession, when taken, to be without impeachment of waste. And as to the lands, hereditaments, and premises intended to be hereby appointed and released, (charged with the said annual sum or rent-charge of £——)(*f*), TO THE USE of the said [*purchaser*] and his assigns, during his natural life, &c. (*ut ante*, p. 74) (*g*). AND IT IS HEREBY

80. IN CONSIDERATION OF FEE-FARM RENT.

Power of entry.

Declaration of the uses of the land.

Declaration of the uses of the fee-farm rent.

(*f*) If the lands are in lease, a term of years should be limited to a trustee for the vendor, (ut ante, p. 321), which would carry the rent accruing under the demise, during which the powers of distress and entry would be inoperative.

(*g*) It is usual, where lands are conveyed to a purchaser, subject to a rent, which he covenants to pay, to make the conveyance to him simply in fee, or at all events, to him for life, with an interposed remainder for his life to a trustee, and then to him in fee, for the purpose of preventing dower, as in the text, but without giving the purchaser any power of appointment; because the appointee of the land claiming under an appointment made by virtue of that power, would not be personally

Mode of limitation, where the purchaser covenants to pay a fee-farm rent.

80. IN CONSIDERATION OF FEE-FARM RENT.

DECLARED AND AGREED that the said annual sum or rent-charge of £—— hereinbefore limited, shall enure, remain, and be to the uses, upon the trusts, and for the intents and purposes hereinafter declared concerning the same; (that is to say), (*uses to prevent dower, ut ante, p.* 73; *covenants for title, &c., by vendor with purchaser, ut ante,* p. 75) (*h*).

bound by the covenant to pay the rent entered into by the donee of the power, as the appointee is *in* under the deed creating the power, and not under the donee. This point was decided in the case of *Roach* v. *Wadham*, 6 East, 289, where it was assumed, that if the defendant had been the grantee of the estate of the covenantor, he would have been bound by the covenant. And the same consequence, it is conceived, would have followed, if the covenanting donee of the power had been made the releasee to uses. Vide ante, p. 346, 361.

Covenant by vendor not to work mines so as to endanger houses; nor to work at the surface within a certain distance from any house;

(*h*) ["*And further*, that the said [*vendor*] will not, nor shall his heirs or assigns, dig, sink, or make, or cause to be dug, sunk, or made, any pit, shaft, drift, level, gate, or excavation, which shall or may, in fact, or in the opinion of two respectable and competent surveyors, weaken, damage, injure, or endanger any house or other building belonging to the said [*purchaser*], his heirs, appointees, or assigns, and being upon the said hereditaments and premises, or any part thereof, or make any open pit or excavation, or any road or way, or other work, upon the surface of the said hereditaments and premises, or any part thereof, within —— yards from any such house or building, being a dwelling house or building containing not fewer than six habitable rooms;

—to pay compensation for damage;

And further, that the said [*vendor*], his heirs, or assigns, will or shall make and pay unto the said [*purchaser*], his appointees, heirs, or assigns, compensation for all damages and losses to be occasioned on the said hereditaments and premises, by the exercise of the powers and authorities hereinbefore reserved, or any of them; such compensation for or in respect of any damage actually done, to be paid forthwith upon the doing thereof, and such compensation, for or in respect of the occupation, incumbrance, or destruction of the surface of any part of the land or ground hereby granted or released, to be paid at a certain rate per acre, or for any less quantity than an acre, according to the value of the land so occupied or destroyed, by equal quarterly payments on the 25th day of March, &c. for or in respect of every quarter, (included within any two of the said days), in any or every year, in or during which

80. IN CONSIDERATION OF FEE-FARM RENT.

AND the said [*purchaser*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant and agree with the said [*vendor*] and his heirs, that he the said [*purchaser*], his heirs, executors, administrators, or assigns, will from time to time, and at all times hereafter, pay or cause to be paid unto the said [*vendor*], his appointees, heirs, or assigns, or other the person or persons for the time being entitled to the annual sum or rent-charge of £——, under or by virtue of the uses hereinbefore expressed concerning the same, The said annual sum or rent-charge of £——, in equal and even portions quarterly, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year; the first of such quarterly portions to be paid on the —— day of —— next, without any deduction or abatement whatsoever (*i*); AND ALSO (*k*), that he the said [*purchaser*], his appointees, heirs,

Covenant by purchaser to pay rent;

—and to expend 1000*l.* in erecting a messuage.

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quarter, or any part thereof, the surface of such land shall be so occupied or incumbered, or shall remain destroyed or incumbered and unrestored to its original plight and condition; *And* will or shall erect and maintain, and cause to be duly kept and tended, all necessary and sufficient fences, gates, and other protections, for the preservation of men and cattle from all danger or damage, from, by, or upon the said mines, pits, roads, ways, and works, or any of them." (*add, if thought expedient, provision for arbitration. Vide ante, Vol.* 4, *pp.* 677, 748; *and see a variety of mining clauses and provisions in that volume, p.* 656 *to p.* 776.)]

—to erect and maintain fences.

(*i*) It is not usual, but seems proper in such a case as the present, to add a covenant by the purchaser for the further assurance of the rent.

(*k*) ["AND ALSO that it shall be lawful for the said [*vendor*], his heirs and assigns, and his and their agents, servants, and workpeople, from time to time, and at all times hereafter to come upon the said hereditaments and premises, or any part thereof, and to work, get, and obtain the said mines and minerals hereinbefore saved, excepted, or reserved, and to have, take, use, exercise, and enjoy all and every the matters and things, rights, powers, authorities, and privileges hereinbefore saved, excepted, reserved, or granted to him and them, according to the true intent and meaning of these presents, without any hinderance, disturbance or interruption from or by the said [*purchaser*],

Covenant by purchaser for enjoyment of mining rights reserved,

80. IN CONSIDERATION OF FEE-FARM RENT.

executors, administrators, or assigns, will, within two years from the day of the date of these presents, erect and build, or cause to be erected and built, on the land, hereditaments, and premises hereby appointed and released, or intended so to be, with proper materials, and in a workman-like manner, one good and substantial messuage or dwelling-house, with suitable offices, to be completed and finished within the period aforesaid; in which erection and building the said [*purchaser*], his heirs, executors, administrators, or assigns, will lay out and expend the sum of 1000*l.* at the least, and will on the request of the said [*vendor*], his appointees, heirs, or assigns, produce to him or them the vouchers or receipts for such expenditure, and the said messuage or dwelling-house so to be erected and built will, at all times hereafter, at his and their own costs, well and sufficiently repair or replace and keep in good condition, [and at his and their own costs insure and keep insured in some respectable office for insurance against fire to the amount of not less than 800*l.*, and the policy of the insurance for the time being, and the receipt for the last premium that shall have fallen due in respect thereof, will, from time to time, upon request produce to the said [*vendor*], his appointees, heirs, or assigns.] PROVIDED ALWAYS, and it is hereby declared and agreed by and between the said parties to these presents, that in case the said [*purchaser*], his appointees, heirs, or assigns, shall neglect or fail to perform his and their covenant hereinbefore expressed, for the erection and building of one good and substantial messuage or dwelling-house on the piece or parcel of ground, hereditaments, and premises hereby appointed and released, or intended so to be, and the production of the vouchers or receipts touching the expenditure hereinbefore covenanted to be made therein as aforesaid, and the repairing [and insuring] thereof, [and the production of the policy of such insurance, and the receipt for the premium thereof,] then and in such case it shall be lawful for the said [*vendor*], his appointees, heirs, and assigns, or other the person or

Proviso for re-entry, on non-performance of covenant to build.

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his heirs or assigns, or any person or persons claiming by, through, under, or in trust for him, them, or any of them, he the said [*vendor*], his heirs or assigns, making satisfaction to the said [*purchaser*], his heirs or assigns, for any loss or damage to be occasioned thereby."]

persons for the time being entitled to the said annual sum or rent-charge of £——, under or by virtue of the uses hereinbefore expressed concerning the same, to enter into and upon the said piece or parcel of ground, hereditaments, and premises hereby appointed and released or intended so to be, and hold and enjoy the same, and receive the rents and profits thereof for his and their own benefit, as in his or their first or former estate; any thing hereinbefore contained to the contrary thereof in anywise notwithstanding (*l*). In witness &c.

80. IN CONSIDERATION OF FEE-FARM RENT.

(*l*) Two parts of this deed are usually executed, one for the grantee of the rent, and the other for the grantee of the land.

81. RELEASE *in* FEE *of* FREEHOLDS, *and* ASSIGNMENT *of* LEASEHOLDS *on a Purchase by* PARTNERS *in* TRADE (*a*).

81. FREEHOLD AND LEASEHOLD ON PURCHASE BY PARTNERS.

THIS INDENTURE, made the —— day of ——, Between [*vendor*], of &c., of the first part; [*purchasers*], all of the city of ——, —— manufacturers and co-partners, carrying on business under the firm or style of [A. & Co.],

Parties.

(*a*) Where a trading firm purchases real estate for the purposes of the partnership, the legal estate is either conveyed to themselves jointly in fee in trust for the purposes of the partnership, or else it is conveyed to a trustee, as in the present instance. Either mode may be adopted, according to circumstances. The advantage of vesting the property in a trustee is, that it prevents the necessity of shifting the legal estate at every change which takes place in the firm, by the introduction of a new partner, or the secession of an old one. If conveyed to the partners themselves, the legal estate under the joint tenancy would, on the decease of any partner, vest in the survivors. The precedent in the text may be adapted to such a case, by simply leaving out the parts relating to the trustee, and making the conveyance directly to the purchasers. Indeed, a conveyance to a plurality of persons, for *any* purpose, differs so little from a conveyance to a single person, that it seemed unnecessary to introduce variations shewing the change of phraseology. On this account no distinct precedent has been given of a deed of conveyance on a purchase by joint tenants. In fact, such purchases are seldom made unless by trustees; and then, if the trusts are disclosed on the face of the conveyance, a former precedent, ante, p. 450, is applicable; if they are not, it differs not from a conveyance to beneficial owners.

Remarks upon the precedent in the text.

81. FREEHOLD AND LEASEHOLD ON PURCHASE BY PARTNERS.

of the second part; and [*trustee*], of &c., of the third part. WHEREAS, by an indenture dated on or about the —— day of ——, in the fourth year of the reign of King James the First over England, made between [*lessor*], then lord of the manor of ——, in the county aforesaid, of the one part, and [*lessee*], of the other part, for the considerations therein mentioned, the said [*lessor*] did demise, grant, and let to farm to the said [*lessee*], his executors, administrators, and assigns, ALL (*parcels*), *To hold* unto the said [*lessee*], his executors, administrators, and assigns, from —— then last, during and unto the full end and term of five hundred years, without impeachment of waste. AND WHEREAS, by divers assignments and other legal transmissions of the said leasehold hereditaments, they became vested in [*late owner*], deceased, the father of the said [*vendor*], for all the residue of the said term of five hundred years, and he, the said [*late owner*], the father, by his last will and testament in writing, bearing date the —— day of ——, bequeathed all his personal estate whatsoever to the said [*vendor*], and appointed him executor of his said will. And the said [*vendor*] duly proved the same in the Court of the Archdeacon of ——, on the —— day of ——. AND WHEREAS the said [*vendor*] is seised to him and his heirs of an estate in fee-simple in possession of and in the freehold hereditaments hereinafter expressed to be hereby released, free from all incumbrances, the same having descended to him as the heir-at-law of [A. B.], his late brother, deceased (*b*). AND WHEREAS the said [*vendor*] has contracted with the [*purchasers*] for the absolute sale to them of the freehold hereditaments hereinafter described and hereby released, for an estate in fee-simple in possession, and also of the said leasehold hereditaments comprised in the hereinbefore-recited indenture of lease, for all the residue of the said term of five hundred years thereby granted respectively free from all incumbrances, at the price or sum of £——, which purchase hath been made by the said [*purchasers*] on the account and for the purposes of their said co-partnership trade or business. NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £—— sterling, by the said [*purchasers*] to the said [*vendor*] in hand paid on the execution

That leasehold premises became vested in late owner.

Will of late owner.

Vendor's seisin of freehold.

Contract for sale.

Testatum.

In consideration of purchase-money,

(*b*) [As to reciting heirships under the existing law, vide ante, p. 162.]

81. FREEHOLD AND LEASEHOLD ON PURCHASE BY PARTNERS.

of these presents, the receipt whereof he the said [*vendor*] doth hereby acknowledge, and therefrom doth release and discharge the said [*purchasers*], their heirs, executors, administrators, and assigns, for ever, by these presents; And also in consideration of 10*s.* by the said [*trustee*] to the said [*vendor*] already paid, the said [*vendor*], at the request and on the nomination of the said [*purchasers*], testified by their severally executing these presents, *Doth*, by these presents, made &c., (*ut ante, p.* 72), grant, bargain, sell, and release unto the said [*trustee*] and his heirs, ALL THAT (*freehold parcels, general words, ut ante, p.* 73). TO HAVE AND TO HOLD the said freehold hereditaments and premises unto the said [*trustee*] and his heirs, TO THE USE of the said [*trustee*], his heirs and assigns, for ever, Upon the trusts, nevertheless, and for the intents and purposes hereinafter expressed concerning the same. AND THIS INDENTURE FURTHER WITNESSETH, that, for the considerations aforesaid, [and also in consideration of 10*s.* by the said [*trustee*] to the said [*vendor*] already paid,] the said [*vendor*], at the request and on the nomination of the said [*purchasers*], testified as aforesaid, *Doth*, by these presents, grant, bargain, sell, and assign unto the said [*trustee*], his executors, administrators, and assigns, all and singular the leasehold hereditaments and premises hereinbefore described and demised by the hereinbefore-recited indenture of lease; *And* all easements, rights, and appurtenances to the said leasehold hereditaments and premises, or any part thereof, belonging or appertaining. *And* all the estate, right, title, interest, term of years yet to come and unexpired, property, claim, and demand whatsoever, both at law and in equity, of him the said [*vendor*], in and to the said leasehold hereditaments and premises. TO HAVE AND TO HOLD the said leasehold hereditaments and premises unto the said [*trustee*], his executors, administrators, and assigns, henceforth for and during all the residue and remainder yet to come and unexpired of the aforesaid term of five hundred years, and for all other the estate, term, and interest of the said [*vendor*] therein, Upon the trusts, nevertheless, and for the intents and purposes hereinafter expressed concerning the same. AND IT IS HEREBY DECLARED AND AGREED by and between the said parties to these presents, that the said [*trustee*], his heirs, executors, administrators, and assigns, shall stand and be seised and possessed of the said freehold and leasehold

vendor releases to trustee for purchasers.

Parcels.

Habendum.

Further testatum.

Assignment of leaseholds by vendor to purchasers' trustee.

All the estate, &c.

Habendum.

Declaration of trust.

81. FREEHOLD AND LEASEHOLD ON PURCHASE BY PARTNERS.

hereditaments and premises respectively hereby released and assigned, *In trust* for the said [*purchasers*] respectively, and their respective executors and administrators, as part of the capital or joint stock of their said co-partnership concern, and in proportion and according to their several parts or shares, rights and interests of and in the same; AND that the said freehold and leasehold hereditaments and premises respectively shall, as between the real and personal representatives of the said [*purchasers*] respectively, and to all intents and purposes whatsoever, be deemed and considered in the nature of personal estate (*c*), any rule of law or equity to the contrary thereof notwithstanding. AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth covenant with the said [*trustee*], his heirs, executors, administrators, and assigns, by these presents, in manner following (that is to say), that, notwithstanding any act, deed, matter, or thing whatsoever made, done, occasioned or suffered by the said [*vendor*], and, with respect to the said freehold hereditaments and premises, any act, deed, matter, or thing made, done, occasioned, or suffered by the said [*brother*], his late brother, deceased, and, with respect to the said leasehold hereditaments and premises, any act, deed, matter, or thing made, done, occasioned, or suffered by the said [*father*], his late father, deceased (*d*), to the contrary, the said vendor now hath in himself full power and absolute authority to convey and assure the said freehold hereditaments and premises unto and to the use of him the said [*trustee*], his heirs and assigns, for ever, and also to assign and assure the said leasehold premises unto the said [*trustee*], his executors, administrators, and assigns, Upon the trusts and in manner aforesaid, according to the true intent and meaning of these presents; *And also*, that it shall be lawful for the said [*trustee*], his heirs, executors, administrators, and assigns respectively, peaceably and quietly to enter into, hold, and enjoy the said freehold hereditaments and premises, from time to time, and at all times for ever hereafter, and the said leasehold hereditaments and premises, from time to time, and at all times during the residue now

Covenants by vendor, that, notwithstanding the acts of himself and his brother and father respectively, he had power to convey and assign the freehold and leasehold premises respectively;

—for peaceable enjoyment,

(*c*) Vide ante, Vol. 7, p. 70.

(*d*) This precedent exemplifies the form of the covenants where entered into by a vendor who has derived distinct parts of the property from different ancestors, to whose respective acts the covenants extend.

81. FREEHOLD AND LEASEHOLD ON PURCHASE BY PARTNERS.

unexpired of the said term of five hundred years; And to receive the rents and profits of all and singular the said freehold and leasehold hereditaments and premises respectively, accordingly, Upon the trusts and in the manner aforesaid, according to the true intent and meaning of these presents, without any lawful eviction, interruption, disturbance, claim, or demand whatsoever from or by the said [*vendor*], his heirs, executors, or administrators, or any other person or persons whomsoever lawfully claiming from, through, under, or in trust for him or them; or, with respect to the said freehold hereditaments and premises, from, through, under, or in trust for the said [*brother*], his said late brother, deceased; or with respect to the said leasehold hereditaments and premises, from, through, under, or in trust for the said [*father*], his said late father, deceased, or by or through the acts or defaults of them or any of them; *And that* free and clear of and from all former and other gifts, grants, estates, titles, charges, and incumbrances whatsoever, created or occasioned by the said [*vendor*], and, with respect to the said freehold hereditaments and premises, by the said [*brother*] his late brother, deceased, and, with respect to the said leasehold hereditaments and premises, by the said [*father*], his late father, deceased, or by any person or persons claiming from, through, under or in trust for them or any of them, or by or through the acts or defaults of them or any of them; *And moreover*, that he the said [*vendor*], his heirs, executors, and administrators, and all other persons lawfully claiming from, through, under, or in trust for him or them, and, with respect to the said freehold hereditaments and premises, from, through, under, or in trust for the said [*brother*], his late brother, deceased, and, with respect to the said leasehold hereditaments and premises, from, through, under, or in trust for the said [*father*], his late father, deceased, will and shall, at any time or times, and from time to time, upon the request and at the charges of the said [*trustee*], his heirs, executors, administrators, or assigns, or of the said [*purchasers*], or any of them, or the executors, administrators, or assigns of any of them, make, do, and execute, or procure to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the more effectually and absolutely releasing, conveying, and assuring of the said freehold hereditaments and premises unto and to the use of the said [*trustee*], his heirs and assigns, for ever, and for the

free from incumbrances;

—and for further assurance.

81. FREEHOLD AND LEASEHOLD ON PURCHASE BY PARTNERS.

more effectually assigning and assuring of the said leasehold hereditaments and premises unto the said [*trustee*], his executors, administrators, and assigns, for all the residue and remainder of the aforesaid term of five hundred years, Upon the trusts and in the manner aforesaid, according to the true intent and meaning of these presents, as by him the said [*trustee*], his heirs, executors, administrators, or assigns, or the said [*purchasers*], or any of them, or the executors, administrators, or assigns of any of them respectively, or his or their counsel, shall be advised and required, so as &c. (*ut ante, p.* 77). IN WITNESS, &c.

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82. BY TWO CO-HEIRESSES, AND ASSIGNMENT OF MORTGAGE TERM.

82. RELEASE *in* FEE *by two* CO-HEIRESSES, *where the* PURCHASER, *previously to the Conveyance, had sold part to a third Person; with* ASSIGNMENT *of* MORTGAGE TERM *to* ATTEND *the* INHERITANCE (*a*); *and* COVENANT *to* SURRENDER *Copyholds; where the Freeholds and Copyholds are intermixed.*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*first vendor*], of &c., spinster, and [*second vendor*], of &c., spinster, of the first part; [*mortgagee*], of &c., of the second part; [*purchaser*], of &c., of the third part; [*trustee to prevent dower*], of &c., of the fourth part; and [*trustee of term*], of &c., of the fifth part.

Recital of mortgage for a term;

WHEREAS, by indenture, bearing date on or about the —— day of ——, and expressed to be made between [*uncle, the late owner*] (*b*), deceased, of the one part, and the said [*mortgagee*], of the other part, It is witnessed, that, for the considerations therein expressed, the said [*uncle*], in pursuance of every power and authority to him given, and in exercise thereof, did appoint, grant, and demise unto the said [*mortgagee*] *All that* (*parcels*); (Save and except all such parts thereof as were copyhold or of customary tenure (*c*)): *To hold* the

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(*a*) See the observations on assignments of terms, ante, p. 106.

(*b*) As it is convenient, for the purpose of elucidating the subsequent recitals, that the relationship of the late owner to the vendors should be apparent, he will be designated as "uncle."

(*c*) Here it seems not to have been distinctly known what part of the estate was copyhold and what was freehold.

82. BY TWO CO-HEIRESSES, AND ASSIGNMENT OF MORTGAGE TERM.

same unto the said [*mortgagee*], his executors, administrators, and assigns, from the day next before the day of the date of the now reciting indenture, for the term of five hundred years, but subject to a proviso for the redemption of the said hereditaments, on payment by the said [*uncle*], his heirs, executors, administrators, or assigns, to the said [*mortgagee*], his executors, administrators, or assigns, of the sum of 700*l.*, with interest for the same, after the rate and on or at the day or time therein mentioned and now past; and in pursuance of a covenant for that purpose contained in the said indenture, the copyhold parts of the said hereditaments were surrendered by the said [*uncle*] To the use of the said [*mortgagee*], his heirs and assigns, for ever, according to the custom of the manor of ——, in the said county of ——, (being the manor of which the said copyhold hereditaments are parcel), for better securing the payment of the said sum of 700*l.* and the interest thereof. AND WHEREAS default was made in payment of the said sum of 700*l.*, at the time by the said indenture appointed for payment of the same. AND WHEREAS the said [*uncle*] departed this life on or about the —— day of ——, in the year ——, intestate as to his real estate, and without issue, and thereupon the freehold and copyhold hereditaments hereinbefore mentioned, and all other the real estate of or to which the said [*uncle*] was seised or entitled at the time of his decease as purchaser (*d*), descended to the said [*vendors*], as his nieces and co-heiresses at law. AND WHEREAS the said [*vendors*] respectively are the only children of [*father*] and [*mother*], his wife, who were married in the parish church of ——, in the county of ——, on the —— day of ——, And the said [*vendors*] were respectively baptized in the said parish church on the —— day of ——, and the —— day of ——. AND WHEREAS the said [*father*] was the eldest brother of the said [*uncle*], deceased, they being respectively the sons of [*grandfather*], of &c., and [*grandmother*], his wife, who were married in the parish church of ——, in the county of ——, and the said [*father*] and [*uncle*], deceased, the sons of the said [*grandfather*], as aforesaid, were respectively baptized at the places and times following, that is to say, the said [*father*] in the said parish church of ——, on the —— day of ——, and the said [*uncle*] in the parish church of ——, in the county of ——, on the —— day of ——. AND WHEREAS the said

—default in payment, and death of uncle;

—pedigree of vendors;

(*d*) Vide ante, p. 162.

82. BY TWO CO-HEIRESSES, AND ASSIGNMENT OF MORTGAGE TERM.

[*uncle*] was interred in the burial-ground of the said parish of ——, on the —— day of ——, and the said [*father*] was interred in the burial-ground belonging to the denomination of Protestant Dissenters, called Independents, in the town of ——, in the county of ——, on the —— day of —— (*e*). AND WHEREAS the said [*vendors*] lately agreed with the said [*purchaser*] for the absolute sale to him of all and singular the freehold and copyhold messuages or tenements, lands and hereditaments, mentioned and comprised in the above-in-part-recited indenture of mortgage, And also of a certain piece of land (not included in the said mortgage), of or to which the said [*uncle*] was seised or entitled at the time of his decease, (and which was purchased by him of [A. B.], of ——, widow), at or for the price or sum of 1500*l.* AND WHEREAS the said [*purchaser*] hath since contracted with [*sub-purchaser*], of ——, for the absolute sale to him of the hereditaments so as aforesaid purchased by the said [*uncle*] of the said [A. B.], and of a piece or parcel of land, containing one acre, two roods, thirty-six poles, allotted to the said [*uncle*], in respect of the said hereditaments comprised in the indenture hereinbefore recited, at or for the price or sum of 300*l.* And the said hereditaments so contracted to be sold to the said [*sub-purchaser*], as aforesaid, are intended to be conveyed to him by the said [*vendors*] and [*purchaser*], by an indenture of release already prepared, and bearing or intended to bear even date with these pre-

—of contract for sale;

—of sub-purchase of part;

As to reciting the pedigree.

(*e*) Though statements of this kind tend to swell the bulk of the deed, and certainly increase the draftsman's labour, by requiring his attention to many minute details, yet the importance of preserving a record of such facts seems to outweigh both these considerations. The judicious advocate for conciseness complains not of the space devoted to purposes of this nature, but to the accumulation of unnecessary and tautologous clauses and expressions, which obscure instead of elucidating the intention of the parties, and leave him the less room for the recital of extrinsic facts material to the title, of which the deeds of conveyance would afford a most valuable repertory. If the plan were generally pursued, the title-deeds themselves would supply materials for preparing a complete abstract of the title, including the requisite corroborative evidence. Where the relationship of the vendors to the person last seised is remote, in order to avoid encumbering the recital with a long statement of facts, it is convenient to indorse a pedigree, in which case the following addition should be made to the recital of the descent:—

Reference to pedigree indorsed.

"as more particularly appears by the pedigree indorsed on these presents."

sents (*f*). And whereas, the said sum of 300*l.* being deducted from the said purchase-money or sum of 1500*l.*, the sum of 1200*l.* only remains to be paid by the said [*purchaser*], as the purchase-money for the said freehold and copyhold hereditaments mentioned or comprised in the indenture hereinbefore recited; and the said sum of 1200*l.* hath been apportioned in manner following, (that is to say), the sum of 800*l.*, part thereof, is agreed to be the apportioned price of the said freehold hereditaments, and the sum of 400*l.*, the residue thereof, is agreed to be the apportioned price of the said copyhold hereditaments (*g*). And

82. BY TWO CO-HEIRESSES, AND ASSIGNMENT OF MORTGAGE TERM.

—of apportionment of consideration-money;

—that mort-

(*f*) Where part of the estate comprised in the original contract for sale has been sub-sold by the purchaser, and conveyed by a separate deed, and the purchase-money paid by the sub-purchaser has gone into the hands of the original vendor, in reduction of his purchase-money, it seems to be usual to state the fact in the conveyance of the remainder; and certainly there may be circumstances rendering this plan advisable, (as where, in consequence of the great advance of price obtained by the purchaser on the sub-sale, the remainder of the purchase-money would appear to be an inadequate price for the remainder of the property); but, in general, there seems to be no reason why the two properties should not be treated as distinct purchases, the purchase-money for that portion which is conveyed to the original purchaser being the original purchase-money minus the sum paid by the sub-purchaser to the vendor. Each deed will, of course, bear the stamp appropriate to the separate transaction.

Remarks upon the sub-contract.

(*g*) Where freeholds and copyholds, or leaseholds and copyholds, are purchased for one entire price, the surrender being made by the Stamp Act the "principal" instrument, *i. e.* the instrument which is to bear the ad valorem stamp in respect of the copyholds, it becomes necessary to apportion the consideration-money, in order that some share of the duty may be placed on the surrender. It is usual in such cases to insert in the deed of conveyance of the freeholds or leaseholds the covenants for title relating to the copyholds, and then the deed recites the entire purchase and the apportionment of the consideration. If, however, the freeholds or leaseholds are likely hereafter to become disunited in ownership from the copyholds, the conveyance of the one and the covenants as to the other should be contained in separate deeds; and then it would be unnecessary to state the fact of the apportionment at all: for the Stamp Act does not require, as seems to be commonly supposed, that this should be done—it merely authorizes purchasers to apportion the consideration-money where properties of different tenures, or held under different titles, are sold at one entire price. Where separate conveyances, therefore, are taken, the subject of each deed may be treated as a distinct purchase, without referring to the contract as to the other, only taking care, of course, that the aggregate amount of the several purchase-monies equals the entire consideration-money for the whole.

Apportionment of consideration-money in regard to the stamp.

The observations which have been made respecting the apportion-

82. BY TWO CO-HEIRESSES AND ASSIGNMENT OF MORTGAGE TERM.

WHEREAS the said principal sum of 700*l.* is now due and owing to the said [*mortgagee*], under or by virtue of the

ment of the consideration-money on a joint purchase of freeholds or leaseholds and copyholds are equally applicable to the case of a purchase of several copyhold estates held of distinct manors, which will require, of course, several surrenders. But it must be remembered, that the necessity of apportioning the consideration-money, in all these cases, arises solely from the imposition of the stamp duty on the *surrender;* and where no surrender is necessary, as in the instance of a sale of copyholds by executors or others*, having a power only and not an estate, the stamp duty being imposed on the deed of bargain and sale, it would not be necessary to apportion the consideration-money, provided that the several properties which compose the entire subject of the contract be conveyed by the same deed, any more than it is where freeholds and leaseholds are comprised in the same conveyance. It is observable, moreover, that the act leaves parties at liberty to apportion the consideration money arbitrarily, without regard to relative value, (any inquiry as to which would be attended with much difficulty), and without regard to the fact whether the duty is increased or diminished by the apportionment; though the scale of duties is so framed as to admit of a considerable reduction being effected by it; for instance, if a sum of 2000*l.* were split into two sums of 1800*l.* and 200*l.*, the duty would be reduced from 25*l.* to 14*l.*

gage-money remains due.

Plan of taking separate conveyances recommended.

The apportionment clause in the act, it will be observed, applies not only to the case of lands being of different tenures, but also to that of lands of the same tenure being held under different titles; and therefore, if a person purchases several freehold, leasehold, or copyhold houses at an entire price, which were derived through different titles, he would be at liberty to take from the vendor a distinct conveyance of each house, apportioning the consideration as he might think proper, and without the necessity, as already suggested, of referring, in any one of the deeds, to the contract as regarded the property conveyed by the others: and it is often advisable to take the conveyances in this manner; for the addition to the expense, if the parties are not unusually numerous, and the deeds are framed with conciseness, is trivial, while, on the other hand, the future inconvenience resulting from several properties being included in one conveyance is great. It frequently happens, that a landed proprietor, who wishes to raise a small sum of money, encumbers the whole for want of having a distinct conveyance of part of his property. And if the estate becomes hereafter distributed among several persons, either as purchasers or volunteers—an event which the exigencies of a family, requiring provision to be made for its different members, are extremely likely to produce—the advantage of having separate conveyances is obvious, in avoiding the necessity of giving attested copies and covenants for production, to say nothing of the disputes which frequently arise between contending claimants for the custody of the deeds relating to their common property. Vide some observations ante, p. 5.

* Vide precedent of a conveyance of copyholds by testamentary donees, ante, p. 424.

indenture hereinbefore recited, but all interest thereon has been paid to the day of the date of these presents, as the said [*mortgagee*] doth hereby acknowledge. And it is intended, and hath been agreed, that the said sum of 700*l.* shall be discharged out of the said purchase-money, and that the said term of five hundred years so vested in the said

82. BY TWO CO-HEIRESSES, AND ASSIGNMENT OF MORTGAGE TERM.

A question may arise as to what is meant by the expression "different titles," in the clause of the act; it could hardly be considered to import, that the respective titles should have been, in every stage of their past history, wholly distinct, presenting no one point of identity, until the properties became united in the vendor. It would probably be enough, that the vendor derived the properties through different channels, though they might antecedently have belonged to one proprietor. Indeed, it has been thought by some whose opinions are entitled to great weight, that, even in cases not within the apportionment clause of the act, a purchaser might take distinct conveyances of several parts of the purchased estate, apportioning the consideration in such manner as he thought proper. But, as an argument against this construction may be drawn from the clause authorising apportionment under certain restrictions, (and which is unnecessary and absurd according to the notion in question), and as the penalties for mis-stating the consideration-money are frightfully severe, a solicitor can hardly be advised to incur the risk; particularly if the proposed apportionment would have the effect of reducing the aggregate amount of duty.

Construction of the term "different titles."

Consistently with the principle of the enactment which authorizes purchasers, in taking their conveyance, to treat the several parts of an estate purchased for an entire consideration, as distinct purchases, it is also provided, that a purchaser may comprise in one conveyance the properties purchased of different persons, paying duty only on the aggregate amount of the purchase-money; and where the several properties are in such a relative local situation as to make it almost certain that they will hereafter be held by the same proprietor, this may be a convenient mode of framing the conveyance; and sometimes a saving of expense, with respect to stamp duty, would be effected by it. Thus, if A. purchased of B. an estate for 10,000*l.*, and of C. an estate for 2000*l.*, the stamp payable on the purchase from B. would not be increased by his including the purchase from C.; and, therefore, the duty which would be payable on the latter would be wholly avoided; but the saving of expense by the diminution of stamp duty, or of the number of deeds, is dearly purchased at the risk of incurring future inconvenience, in case the property should, at a subsequent period, be split into distinct portions; and therefore, the expedient ought never to be adopted if such a severance is likely to happen; and likely it should be deemed to be, unless one part is absolutely essential to the beneficial enjoyment of the other. Of course where a purchaser buys several aliquot shares in the same property, entering into a separate contract with each owner, it is desirable to include the conveyance of the several purchased shares in one deed, and which deed will bear the ad valorem duty payable on the aggregate purchase money.

As to comprising in one conveyance property purchased of different vendors.

82. BY TWO CO-HEIRESSES, AND ASSIGNMENT OF MORTGAGE TERM.

[*mortgagee*], as aforesaid, for securing the payment thereof, shall be assigned to the said [*trustee of term*], his executors, administrators, and assigns, upon the trusts and in manner hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of 700*l.* of lawful British money, part of the said sum of 800*l.*, to the said [*mortgagee*] paid by the said [*purchaser*], immediately before the execution of these presents, at the request and by the direction of the said [*vendors*], testified by their respectively executing these presents, and in full satisfaction and discharge of all principal monies and interest now due or owing to the said [*mortgagee*], under or by virtue of the indenture of mortgage hereinbefore recited, the receipt of which sum of 700*l.* he the said [*mortgagee*] doth hereby acknowledge, and from the same doth acquit and discharge the said [*purchaser*], and also the said [*vendors*] respectively, and their respective heirs, executors, administrators, and assigns, and the estate and effects of the said [*uncle*], deceased, for ever; And also in consideration of the sum of 100*l.* of like lawful money, residue of the said sum of 800*l.*, to the said [*first vendor*] and [*second vendor*] at the same time paid by the said [*purchaser*], (the payment and receipt of which several sums of 700*l.* and 100*l.*, making together the sum of 800*l.*, they the said [*vendors*] do hereby respectively acknowledge, and from the same do respectively acquit and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, for ever), *They* the said [*vendors*] *Do*, and each of them *Doth*, by these presents, made &c., (*ut ante, p.* 72), grant, bargain, sell, and release, unto the said [*purchaser*] and his heirs, *All such* and so many and such part and parts as is or are freehold or charterhold of and in all and singular the messuages or tenements, lands, hereditaments, and other the premises hereinbefore described or mentioned, and comprised in the indenture hereinbefore recited, with their appurtenances; *And* of and in all outhouses, &c.; *And* of and in the reversion, &c.; *And* all the estate, right, title, interest, use, trust, inheritance, property, possession, benefit, and equity of redemption, claim, and demand whatsoever, of the said [*vendors*] respectively, in, to, from, or out of the said hereditaments and premises. To HAVE AND TO HOLD the said messuages or tenements, lands, hereditaments, and all and singular other the premises hereby released or intended so to be, unto the said [*purchaser*],

Testatum.

All such parts of hereditaments described as are freehold.

General words.

And all the estate, &c.

Habendum.

82. BY TWO CO-HEIRESSES, AND ASSIGNMENT OF MORTGAGE TERM.

and his heirs, for ever, *To the use* (*uses to prevent dower, ut ante, p.* 73.) AND THIS INDENTURE ALSO WITNESSETH, that for the considerations hereinbefore expressed (*h*), the said [*first vendor*], as to and concerning one undivided moiety or half part of the copyhold hereditaments hereinafter covenanted to be surrendered, and the acts and deeds relating thereto, and not further or otherwise, doth hereby, for herself and for her heirs, executors, and administrators, *And* the said [*second vendor*], as to and concerning the other undivided moiety or half part of the said copyhold hereditaments, and the acts and deeds relating thereto, and not further or otherwise, doth hereby, for herself and for her heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his heirs and assigns, that they the said [*vendors*] respectively, or their respective heirs, will or shall, on the request and at the cost and charges of the said [*purchaser*], his heirs or assigns, well and effectually surrender into the hands of the lord of the said manor of ——, according to the custom of the said manor, To THE USE of the said [*purchaser*], his heirs and assigns, for ever, *All* such and so many and such part and parts of the messuages or tenements, lands, hereditaments, and premises, hereinbefore mentioned or described, as is or are of copyhold or customary tenure, with the appurtenances, *To the intent* that the said [*purchaser*], his heirs or assigns, may be admitted tenant or tenants of the said copyhold hereditaments, To hold the same to him and his heirs for ever, at the will of the lord of the said manor, by copy of court-roll, according to the custom of the same manor, and by and under the rents, suits, and services therefore due, and of right accustomed to be paid and performed; And that, in the meantime, and until such surrender shall be made and perfected, they the said [*vendors*] respectively, and their respective heirs, will and shall stand and be seised of the said respective moieties of the said copyhold hereditaments, with the appurtenances, *Upon trust* for the said [*purchaser*], his heirs and assigns. AND the said [*first vendor*], as to and concerning one undivided moiety of the said freehold and copyhold hereditaments, and the acts and deeds relating thereto, and not fur-

Further testatum.

Vendors covenant to surrender copyholds.

Vendors, each as to her own moiety, covenant with purchaser;

(*h*) As the payment of the consideration-money applicable to the copyholds appears on the face of the surrender, which bears also the ad valorem duty, some practitioners do not, as is the *more usual practice*, state the fact also in the covenant to surrender. Vide ante, pp. 331, 473.

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ther or otherwise, doth hereby, for herself and her heirs, executors, and administrators; *And* the said [*second vendor*], as to and concerning the other undivided moiety of the same hereditaments, and the acts and deeds relating thereto, and not further or otherwise, doth hereby, for herself and for her heirs, executors, and administrators, covenant, promise, and agree to and with the said [*purchaser*] and his heirs in manner following, (that is to say), That, notwithstanding any act, deed, matter, or thing whatsoever made, done, committed, or suffered to the contrary by them the said [*vendors*], or either of them, or by the said [*uncle*], their uncle, deceased, (except as hereinafter is excepted), they the said [*vendors*], or one of them, now have or hath good right, full power, and lawful and absolute authority to grant, release, surrender, and assure the said freehold and copyhold messuages or tenements, lands, hereditaments, and premises respectively hereby released and covenanted to be surrendered, or intended so to be, to the uses and in manner aforesaid, according to the true intent and meaning of these presents; *And also*, that the said freehold hereditaments and premises hereby released or intended so to be shall henceforth, and at all times hereafter, remain, continue, and be to the uses, upon the trust, and for the intents and purposes hereinbefore expressed concerning the same, and the rents and profits thereof shall and may be received and taken accordingly; *And also*, that it shall be lawful for the said [*purchaser*], his heirs and assigns, from time to time, and at all times for ever hereafter, to enter into, hold, and enjoy, and receive and take the rents and profits of the said copyhold hereditaments and premises hereby covenanted to be surrendered, according to the custom of the manor of ——, in respect as well of the said freehold as of the said copyhold hereditaments, without any hindrance or denial whatsoever of, from, or by them the said [*vendors*], or either of them, or the heirs of them or of either of them, or any other person or persons whomsoever rightfully claiming, by, from, through, under, or in trust for them or either of them, or by, from, through, under, or in trust for the said [*uncle*], deceased, other than and except as hereinafter excepted; *And* that free and clear of and from all former and other adverse estates, titles, troubles, charges, and incumbrances whatsoever, at any time or times heretofore, and to be at any time and from time to time hereafter, had, made, done, committed, or suffered by the said [*vendors*], or

that, notwithstanding &c., they have power to convey;

—that premises shall remain to the uses aforesaid,

free from incumbrances;

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either of them, or by the said [*uncle*], deceased, or by any person or persons whomsoever rightfully claiming by, from, through, under, or in trust for him, them, or any of them, (save only and except as appears by the recitals hereinbefore contained (*i*)); *And moreover*, that they the said [*vendors*] respectively, and their respective heirs, and all other persons whosoever rightfully claiming any estate, right, title, trust, or interest, of, in, to, or out of, or upon the said hereditaments and premises respectively, hereby released and covenanted to be surrendered, or intended so to be, by from, under, or in trust for either of them, or by, from, through, under, or in trust for the said [*uncle*], deceased, will and shall, at all times hereafter, upon every request, and at the costs of the said [*purchaser*], his heirs, appointees, or assigns, make, do, and execute, or cause or procure to be made, done, and executed, all such further grants, acts, deeds, conveyances, surrenders, and assurances in the law whatsoever, for the more effectually granting, releasing, surrendering, confirming, or otherwise assuring the said hereditaments and premises respectively, hereby released and covenanted to be surrendered or intended so to be, with the appurtenances, To the uses and upon the trusts hereinbefore limited and declared of or concerning the same, according to the true intent and meaning of these presents, as by the said [*purchaser*], his heirs, appointees, or assigns, [or his or their counsel,] shall be reasonably [devised, or advised and] required, and be tendered to be made, done and executed.

—and for further assurance.

Further testatum.

AND THIS INDENTURE ALSO WITNESSETH, that, for the considerations hereinbefore expressed, and also in consideration of 10*s.* to the said [*mortgagee*] paid by the said [*trustee of term*] immediately before the execution of these presents, the receipt whereof is hereby acknowledged, *He* the said [*mortgagee*], on the nomination of the said [*purchaser*], and at the request and by the direction of the said [*vendors*], testified as aforesaid, *Doth*, by these presents, bargain, sell, assign, transfer, and set over unto the said [*trustee of term*], his executors, administrators, and assigns, *All* such and so many and such part and parts of the freehold hereditaments and premises hereinbefore released, or intended so to be, as are comprised in the said term of five hundred years, so as

For considerations aforesaid, mortgagee assigns to purchaser's trustee,

parcels.

(*i*) As to the propriety of noticing attendant terms of years in the covenant against incumbrances, vide ante, p. 381.

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aforesaid granted to the said [*mortgagee*] by the indenture hereinbefore recited, and every part of the same, with the appurtenances; *And* all the estate, right, title, interest, term and terms of years yet to come and unexpired, trust, property, possession, claim, and demand whatsoever of him the said [*mortgagee*], in, to, or out of the premises, with the appurtenances. To HAVE AND TO HOLD the said hereditaments and premises hereby assigned or intended so to be unto the said [*trustee of term*], his executors, administrators, and assigns, from henceforth for and during all the residue and remainder of the said term of five hundred years therein now to come and unexpired; and for all other the estate, term, and interest (if any) of the said [*mortgagee*] in the said premises; but nevertheless UPON TRUST for the said [*purchaser*], his heirs, appointees, and assigns, and to be assigned and disposed of from time to time as he or they shall direct or appoint, and in the meantime to attend, wait upon, and go along with the freehold, reversion, and inheritance of the said hereditaments, and to protect the same from and against all charges and incumbrances, (if any), mesne and subsequent to the creation of the same term; and upon no other trust whatsoever. (*Covenant by mortgagee with trustee that he has not encumbered, ut ante, p.* 106.) IN WITNESS &c.

And all the estate, &c.

Habendum for residue of term,

in trust for purchaser, and to attend the inheritance.

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83. TENANT FOR LIFE TO RAILWAY COMPANY.

83. [CONVEYANCE *of Freehold Lands by* TENANT FOR LIFE *to a* RAILWAY COMPANY (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part, and the —— Rail-

As to the provisions for conveyances to railway companies.

(*a*) [The act contained the usual power, enabling "corporations, tenants in tail, or for life, or for any other partial or qualified estate or interest, husbands, guardians, trustees, and feoffees in trust for charitable and other purposes, committees, executors, and administrators, and all trustees, femes covertes," &c., to contract for, sell, and convey the entire estate and interest in any lands, after they should have been set out and ascertained; and the usual form of conveyance was given, which, however, is seldom precisely applicable, and which it is never made compulsory on the parties to adopt. And it was enacted, that all such conveyances should be valid and effectual, and should operate to merge all terms of years attendant, by express declaration or by construction of law, on the estate or interest so conveyed, and to bar and

83. TENANT FOR LIFE TO RAILWAY COMPANY.

way Company, (established, incorporated, and empowered by an act of Parliament passed in the —— year of the reign of Queen Victoria, intituled, "An Act, &c."), of the other part. WHEREAS, (*recite marriage settlement or will, and subsequent events, shewing the vendor's title*). AND WHEREAS, in pursuance of the powers and authorities contained in the above-recited act, the said [*vendor*] hath contracted (*b*) for the sale to the said company of the hereditaments hereinafter described, free from incumbrances, at the price of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of the sum of £—— paid by the said company into the Bank of England in the name and with the privity of the Accountant-General of the Court of Chancery, "Ex parte The —— Railway Company, [*or, if the sum does not exceed* 200*l.*, to [*trustees*], two trustees duly appointed to receive the same], pursuant to the said act, (the payment of which sum of £——, in manner aforesaid, the said [*vendor*] doth (*c*) hereby admit and acknowledge, and therefrom doth for ever acquit, release, and discharge the said company, their successors and assigns), the said [*vendor*] DOTH hereby convey to the said company, their successors and assigns, ALL those several closes of land situate in the parish of

Recitals.

Testatum.

In consideration of money paid into Bank of England,

vendor conveys

Parcels.

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destroy all estates tail, titles to dower, and all other estates, remainders, &c. But although terms should be merged, they should in equity afford the same protection as if they had been assigned in trust for the company. Where the estates of infants and other incompetent parties are conveyed, the purchase-money is to be paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Chancery, (who, by the stat. 5 Vict. c. 5, is now substituted for the Accountant-General of the Court of Exchequer, under all acts in which that officer was mentioned), and to be dealt with by that court. If the amount does not exceed 200*l.*, the parties immediately interested in the rents and profits generally have the option of requiring the payment to be made to two trustees to be approved by the company.]

(*b*) [In the act under which this conveyance was drawn the parties interested in the lands were authorized "to contract for, sell, and convey the same" to the company. Sometimes the form runs that the company may contract with tenants for life, &c., for the purchase of the lands. In that case the recital would be of a contract *by* the company; but the observance of these niceties of expression is quite immaterial to the effect of the instrument.]

(*c*) ["The said [*vendor*] and [*trustees*] do hereby respectively admit and acknowledge, and therefrom do for ever acquit," &c.

Money paid to trustees.

83. TENANT FOR LIFE TO RAILWAY COMPANY.

——, in the county of ——, containing in the whole —— acres, now or late in the occupation of ——, which several closes of lands and hereditaments are more particularly delineated in the plan indorsed on these presents, and therein distinguished by a red tint or colour, and are also included in the plot or piece delineated in the map of reference of the said company deposited with the clerk of the peace for the said county, and therein distinguished by the number ——; Together with all ways, rights, and appurtenances thereunto belonging; And all such estate, right, title, and interest in and to the same, and every part thereof, as he the said [*vendor*] is or shall become seised or possessed of, or is by the said act capacitated or empowered to convey.

Habendum.

To HOLD the premises to the said company, their successors and assigns, for ever, according to the true intent and meaning of the said act.

Covenants for right to convey, and further assurance.

And the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said company and their successors, that, notwithstanding any act, deed, matter, or thing by him the said [*vendor*] done, made, committed, or knowingly suffered to the contrary, he hath in himself good right and lawful authority by these presents to convey and assure the said hereditaments and premises to the said company, their successors and assigns for ever, free from incumbrances, in manner aforesaid, according to the true intent and meaning of these presents. (*And for further assurance, ut ante, p.* 77.) IN WITNESS &c.]

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84. COPYHOLDS UNDER A BANKRUPTCY.

84. DEED *of* BARGAIN *and* SALE *of* COPYHOLDS, *Part of a* BANKRUPT'S ESTATE, *by the* COMMISSIONERS, *with the Concurrence of the* ASSIGNEES *and a* MORTGAGEE, *to a* PURCHASER; *and Authority to a third Person to* SURRENDER *to the* PURCHASER (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*commissioner*], of &c., the commissioner acting in

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As to conveyances of the copyhold estates of bankrupts.

(*a*) Before the bankrupt act of 6 Geo. 4, c. 16, it was usual to except copyholds out of the bargain and sale to the assignees, and for the commissioners to convey them when sold directly to the purchaser, who was admitted at the lord's court upon that conveyance, without any actual surrender; and this practice was sanctioned by the stamp

prosecution of a fiat in bankruptcy awarded and issued against [*bankrupt*], late of ——, in the county of ——, 84. COPYHOLDS UNDER A BANKRUPTCY.

act, 55 Geo. 3, c. 184, Sched. Part 1, tit. "CONVEYANCE;" which provides that, "where any copyhold or customary estate shall be conveyed by a deed of bargain and sale, *by the commissioners named in a commission of bankrupt*, or by executors or others by virtue of a power given by will, or by act of Parliament, or otherwise *where a surrender shall not be necessary*, the deed of bargain and sale shall be deemed the principal instrument." But, by the statute of 6 Geo. 4, c. 16, s. 68, it is enacted, that "the commissioners shall have power by deed indented and enrolled in any of his Majesty's Courts of record, to make sale for the benefit of the creditors of any copyhold or customaryhold lands, or of any interest to which any bankrupt is entitled therein, *and thereby to entitle or authorize any person or persons on their behalf to surrender the same, for the purpose of any purchaser or purchasers being admitted thereto**." It is clear, therefore, that this enactment makes it now necessary that there should be a deed of bargain and sale of the copyhold estate of a bankrupt, from the commissioners to the purchaser, and also an actual surrender of the estate by some person to be authorized by the commissioners for that purpose.

Stat. 1 & 2 Will. 4, c. 56, s. 26.

Bankrupt's estate directed by 6 Geo. 4, c. 16, to be conveyed by the commissioners to the assignees, to vest in them by virtue of their appointment.

The stat. 1 & 2 Wm. 4, c. 56, sect. 26, provides, that "where any person shall have been adjudged a bankrupt, *all such present and future real estate of such bankrupt*, whether in the United Kingdom of Great Britain and Ireland, or in any of the dominions, plantations, or colonies, belonging to his Majesty, *as by the said recited act is directed to be conveyed by the commissioners to the assignees*, shall vest in such bankrupt's assignee or assignees for the time being, by virtue of his or their appointment, without any deed of conveyance for that purpose; and as often as any such assignee or assignees shall die or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed, shall, by virtue of such appointment, vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose."

This section, it is clear, does not embrace copyholds, because they are not, by the act of 6 Geo. 4, c. 16, "directed to be conveyed by the commissioners to the assignees;" and as there is no other provision in the

* [By sect. 69, it is enacted, "That every person to whom any sale of copyhold or customary lands or tenements shall be made by the commissioners shall, before he enter into or take any profit of the same, agree and compound with the lords of the manors of whom the same shall be holden for fines, dues, and other services as theretofore have been usually paid for the same; and thereupon the said lords shall, at the next or any subsequent court to be holden for the said manors, grant unto such vendor, upon request, the said copyhold or customary lands or tenements for such estate or interest as shall have been so sold to him as aforesaid, reserving the ancient rents, customs, and services, and shall admit him tenant of the same."]

6 Geo. 4, c. 16, s. 69.

Purchasers of copyholds to compound with the lord for their fines.

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dealer and chapman, of the first part; [*official assignee*], of &c., the official assignee, and [*creditors' assignees*], of &c.,

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act of 1 & 2 Wm. 4, directly applicable to them, it should seem, either that copyholds were inadvertently lost sight of by the framers of the act, or that it was considered that they were sufficiently provided for by the existing law. Of course, the latter is to be presumed, if the enactments leave undisturbed the powers which, under the prior act, the commissioners possessed over copyholds; or rather, if they transfer these powers to the new commissioners; and such, it is submitted, is the fair construction of them; for sect. 7 expressly authorizes any one or more of the six commissioners, appointed pursuant to the act, to exercise the same powers and authorities, except as to commitments, as were possessed by commissioners under the previous act; and sect. 12 provides, that the persons to be appointed commissioners in fiats shall have the like power and authority as if they were appointed special commissioners, by virtue of a commission under the great seal. Now, although the former section is confined to the six commissioners, and therefore, in terms, does not embrace country commissions; and although the latter does not expressly vest in the commissioners appointed by the fiats the powers of the commissioners under the former act, yet it is apprehended that the effect of the whole act is to invest the new commissioners of both classes with all the powers possessed by the former commissioners; and one of these powers being, that of "making sale" of copyholds, they have succeeded to this with the other authorities of their predecessors. [The single commissioner to whom the fiat is now assigned, as well in country as in town fiats, is invested with all the authorities (except as to committal, &c.) which were formerly exercisable by the commissioners acting under a separate commission. Stat. 1 & 2 Will. 4, c. 56, ss. 7, 16; 5 & 6 Vict. c. 122, ss. 46, 52, 59, 66; Reg. Gen. Nov. 12, 1842.]

Bankrupt tenant in tail.

[When the bankrupt is tenant in tail, the commissioner is enabled to dispose of the copyhold so as to entitle the purchaser to admittance without a surrender. Stat. 3 & 4 Will. 4, c. 74, s. 66.]

Whether ad valorem stamp should be impressed on the surrender.

A question has arisen, whether the ad valorem duty payable on the transaction should be impressed on the bargain and sale, or on the surrender. Upon this point opinions differ. It appears to the Editor, that the surrender ought to bear the stamp, and for the following reasons:—The Stamp Act for all purposes has made the surrender the principal instrument in regard to copyholds, so far as it was possible to do so, having in the instance under consideration imposed the ad valorem duty on the bargain and sale, only because at that time no surrender was used in such cases, as appears by the terms of the clause in question, *which expressly confine it to cases in which no surrender shall be necessary*. Hence it should seem, that the bankrupt act, by imposing the necessity of a surrender in the case of the sale of a bankrupt's copyholds, has taken it altogether out of the clause in the stamp act, which places the duty on the bargain and sale, and has brought the transaction within the next clause of that act, which provides that "in *other* cases of copyhold or customary estates the surrender or voluntary grant, or the memoran-

the creditors' assignees of the estate and effects of the said [*bankrupt*], of the second part; [*mortgagee*], of &c., of the third part; the said [*bankrupt*], of the fourth part; [*purchaser*], of &c., of the fifth part; and [*person authorized to surrender*], of &c., of the sixth part. WHEREAS, at a customary court holden for the manor of ——, in the said county of ——, on the —— day of ——, the said [*bankrupt*] was admitted tenant of the hereditaments hereinafter particularly described, and intended to be hereby bargained and sold, To hold the same unto the said [*bankrupt*], his heirs and assigns, for ever, by copy of court-roll, at the will of the lord, according to the custom of the said manor. AND WHEREAS, by an indenture bearing date the —— day of

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Recital of bankrupt's admission.

Recital of mortgage.

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dum thereof respectively, if made out of court, or the copy of court-roll of the surrender or voluntary grant if made in court, shall be deemed the principal instrument." If this view of the matter is correct, the deed of bargain and sale is only liable to the common deed-stamp of 1*l.* 15*s.* Indeed, it has been suggested to the Editor, whether, as the Bankrupt Act empowers the commissioners by deed "to make sale of" but not to convey, the bankrupt's copyhold lands, the deed of bargain and sale is not to be considered merely as evidence of a contract for sale, and as such exempt from stamp duty, under the 98th section of the bankrupt act. The contrary, however, seems to be clear, as the clause in question was evidently framed for the exoneration of bankrupts' estates, and not for the advantage of purchasers; besides, the sales of bankrupts' estates are expressly exempted from *auction* duty, and expressio unius est exclusio alterius. (Vide ante, p. 39). All these difficulties have arisen entirely from the alteration introduced by the act of 6 Geo. 4, c. 16, in superadding the requisition of an actual surrender to the deed of bargain and sale, which was antecedently used without any such concomitant. The additional trouble and expense which it has occasioned are much complained of. As the policy of the Legislature of late years has been to facilitate the transfer of property as much as possible, and as, in one instance, an act has been passed for the sole purpose of *taking away* the necessity of a surrender of copyholds, (stat. 55 Geo. 3, c. 192), it is singular that, in the present case, in dereliction of this policy, a new and onerous clog on alienation should have been imposed, and that by the abolition of an established practice, from which no inconvenience had been found to arise.

Bargain and sale to bear the stamp only when there is no surrender.

Since writing the preceding observations, it has been mentioned to the Editor, that the officers of the enrolment office in Chancery hesitate to receive a bargain and sale of copyholds from the commissioners of bankrupt to a purchaser unless it bears the ad valorem stamp, conceiving that it (and not the surrender) ought to bear the stamp. The practice is clearly erroneous.

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—, and made between the said [*bankrupt*], of the one part; and the said [*mortgagee*], of the other part; the said [*bankrupt*], in consideration of the sum of 4000*l.* then lent and advanced to him by the said [*mortgagee*], did covenant to surrender into the hands of the lord of the said manor, All and singular the hereditaments whatsoever of him the said [*bankrupt*], holden of the said manor, the particulars whereof are stated in the thereunder written schedule (which schedule comprises the hereditaments hereinafter particularly described, and hereby bargained and sold, or intended so to be), *To the use* of the said [*mortgagee*], his heirs and assigns, upon certain trusts, for securing to the said [*mortgagee*], his executors, administrators, and assigns, the payment of the sum of 4000*l.* then advanced and lent by the said [*mortgagee*] to the said [*bankrupt*], with interest for the same. But no surrender was ever made or executed in pursuance of the said covenant. AND WHEREAS, on the —— day of ——, a fiat in bankruptcy, under the hand of the Lord High Chancellor of Great Britain was awarded and issued against the said [*bankrupt*], and he was thereupon duly found and declared a bankrupt. And on the —— day of ——, the said [*official assignee*] was duly appointed official assignee; and on the —— day of ——, the said [*creditors' assignees*] were duly chosen by the creditors and appointed assignees of the estate and effects, real and personal, of the said bankrupt; a certificate of which appointment under the hand of the said commissioner was, on the —— day of ——, duly entered of record, pursuant to the act of Parliament in that behalf. AND WHEREAS the said [*assignees*], in pursuance of the powers vested in them as assignees of the estate of the said bankrupt, chosen as aforesaid, and by the order and direction of the said [*commissioner*], and at the request and with the consent and approbation of the said [*mortgagee*], caused the said hereditaments hereinafter described, and hereby bargained and sold, or intended so to be, to be put up to sale by public auction (together with other parts of the estate of the said bankrupt), at the —— inn, in —— aforesaid, on the —— day of —— now last past; at which sale the said [*purchaser*] became and was declared to be the highest bidder for the same, and the purchaser thereof at the sum of 100*l.*, and thereupon paid into the hands of the said [*official assignee*] the

—fiat in bankruptcy.

Sale by auction.

84. COPYHOLDS UNDER A BANKRUPTCY.

sum of 10*l.*, by way of deposit and in part of the said purchase-money, conformably to the conditions of the said sale. NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of 10*l.*, so paid by the said [*purchaser*] to the said [*official assignee*] at the time of the said sale, by way of deposit and in part of the said purchase-money as aforesaid, and of the further sum of 90*l.* of lawful British money, other part and in full of the said purchase-money, in hand paid by the said [*purchaser*] to the said [*official assignee*] (*b*), by the direction and with the privity and consent of the said [*commissioner*] [*creditors' assignees*] [*mortgagee*] and [*bankrupt*], (testified by their severally executing these presents), the payment of which several sums of 10*l.* and 90*l.* in the manner aforesaid, making together the sum of 100*l.*, and that the same is in full for the absolute purchase of the hereditaments hereinafter described, The said [*assignees* and *mortgagee*] do hereby acknowledge, and from the same do, and each of them doth, acquit and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns by these presents; [And also in consideration of the sum of 10*s.* of like lawful money to each of them the said [*commissioner*], [*mortgagee*], and [*bankrupt*], paid by the said [*purchaser*], immediately before the execution of these presents, the receipts whereof respectively are hereby acknowledged;] the said [*commissioner*], (with the privity and consent, and by the direction and appointment of the said [*assignees*], [*mortgagee*], and [*bankrupt*], testified as aforesaid), by virtue and in pursuance of the power and authority vested in him the said [*commissioner*] by the act of Parliament in this behalf, DOTH, by these presents, order, bargain and sell, And the said [*assignees*], (with the privity and consent of the said [*mortgagee*] and [*bankrupt*], testified as aforesaid, and in pursuance and in exercise of the power and authority for this purpose vested in them as assignees chosen as aforesaid, and according to their estate and interest in their said capacity of assignees in the hereditaments hereinafter described, and not further or otherwise); *And also* the said [*mortgagee*], (by the direction of the

Testatum.

In consideration of purchase-money, commissioner bargains and sells, and assignees, mortgagee, and bankrupt, release to purchaser,

(*b*) Here the purchase-money is expressed to be paid to the official assignee, and not to the mortgagee. This, of course, would be mere matter of arrangement between the parties.

84. COPYHOLDS UNDER A BANKRUPTCY.

said [*assignees*], as assignees chosen as aforesaid, testified as aforesaid, and according to his estate and interest as such mortgagee in the hereditaments hereinafter described, and so far as he can or ought to do at law or in equity, but not further or otherwise), Do, and every of them DOTH, by these presents, remise, release, and confirm, And the said [*bankrupt*] DOTH ratify and confirm unto the said [*purchaser*] and his heirs,

Parcels.

ALL THAT (*parcels*); Together with all and singular the rights, members, and appurtenances to the said hereditaments hereby bargained and sold, or intended so to be, or any part thereof, belonging or in anywise appertaining; And the reversion and reversions, remainder and remainders, yearly

—all the estate, &c.

and other rents, issues, and profits thereof; And all the estate, right, title, interest, trust, possession, property, claim, and demand whatsoever, both at law and in equity, of them the said [*commissioner*], [*assignees*], [*mortgagee*], and [*bankrupt*], and each of them, in and to the same premises. To

Habendum to purchaser in fee.

HAVE AND TO HOLD the said hereditaments and premises (freed and absolutely discharged of and from the hereinbefore-recited mortgage), unto *and to the use* of the said [*purchaser*], his heirs and assigns, for ever, subject nevertheless to the rents and services accustomed to be paid and performed, in respect of the same hereditaments, to the lord

Further testatum.

of the said manor of ——. AND THIS INDENTURE ALSO WITNESSETH, that, for the considerations aforesaid, the said [*commissioner*], at the request and on the

Commissioner nominates a person to surrender to the purchaser.

nomination of the said [*purchaser*], testified as aforesaid, by virtue and in pursuance of the power and authority in this behalf vested in him by act of Parliament, doth by these presents authorize and empower the said [*person authorized to surrender*] personally to appear at the next or any subsequent court to be holden for the said manor of ——, and then and there, or out of Court, (as the case may be), in the name and on the behalf of the said [*commissioner*], as such commissioner as aforesaid, to surrender the said hereditaments and premises into the hands of the lord of the said manor, *To the use* of the said [*purchaser*], his heirs and assigns, *To the intent* and purpose that the said [*purchaser*] may be admitted tenant of the hereditaments, *To hold* the same to him, his heirs and assigns, for ever, at the will of the lord, according to the custom of the said manor. (*Covenant by assignees, mortgagee, and bankrupt, respectively, that they have not encum-*

bered, "except as appears by these presents" (*c*), (*ut ante, p.* 266). In witness &c. (*d*). 84. COPYHOLDS UNDER A BANKRUPTCY.

(*c*) The words in inverted commas ought to be introduced, because the bankrupt who made the recited mortgage is included in this covenant, for here he does not enter into the usual vendor's covenants, (ut ante, p. 266).

(*d*) This deed must be inrolled. Bargains and sales by commissioners of bankrupt are not required to be inrolled within six months, as are bargains and sales under the stat. of 27 Hen. 8, c. 16, with which they are sometimes confounded.

85. [CONVEYANCE *of* COPYHOLDS *of a* BANKRUPT TENANT IN TAIL IN POSSESSION, *by the Commissioner and Assignees under the Fiat* (*a*), *to be entered on the Court-Rolls. Variation where the Estate is of Freehold Tenure.* (*A very short Form*). 85. FREEHOLDS OR COPYHOLDS OF BANKRUPT TENANT IN TAIL.

THIS INDENTURE, made the —— day of ——, BETWEEN [*commissioner*], of &c., the commissioner acting in the Parties.

(*a*) [Formerly the commissioners might by inrolled indenture have disposed of the bankrupt's estates-tail, as against him and his issue and all others whom he might have barred. Stats. 21 Geo. 1, c. 19, s. 12; 6 Geo. 4, c. 16, s. 65. See *Jervis* v. *Tayleur*, 3 B. & Al. 557: *Doe* d. *Spencer* v. *Clark*, 5 B. & Al. 458. By the 6 Geo. 4, c. 16, s. 65, the commissioners were empowered to make sale of the bankrupt's estates tail for the benefit of the creditors, which enactment was held to make the bankrupt's freehold estates-tail pass with his other estates, under the bargain and sale to the assignees. *Ex parte Somerville*, 1 M. & A. 408; 3 Dea. & C. 668. So that, by the stat. 1 & 2 W. 4, such estates-tail would have passed to the assignees on their appointment. The decision, however, is open to observation, and now the enactment on which it was founded is repealed by the stat. 3 & 4 Will. 4, c. 74, s. 55; and by subsequent sections all the powers of disposition over his estates-tail and base fees, which the bankrupt might have exercised, are conferred upon the commissioner acting under the fiat. Consequently, with the consent of the protector, if there be one, the commissioner may bar the remainders, and without his consent may pass a base fee; which, upon there ceasing to be a protector during its continuance, will immediately be enlarged into such estate as might have been passed, if there had been no protector at the time of the disposition by the commissioner. By sect. 65, the death of the bankrupt is, in certain cases, not to affect the power of the commissioner. See 5 B. & Al. 458; 1 Hayes' Introd. Conv. 202.] Sale of bankrupt's estates-tail.

[This authority of the commissioner is to be exercised by a deed

85. FREEHOLDS OR COPYHOLDS OF BANKRUPT TENANT IN TAIL.

execution of a fiat in bankruptcy, issued the —— day of ——, against [*bankrupt*], of &c., of the first part; [*official assignee*], of &c. the official assignee, and [*creditors' assignees*], of &c., the creditors' assignees of the estate and effects of the said bankrupt, of the second part; and [*purchaser*], of &c., of the third part. Recital of surrender. WHEREAS (*b*), on the —— day of ——, the copyhold hereditaments hereinafter described were surrendered to the use of [A. B.], for his life, with remainder to the use of the first son of the said A. B. by [*wife*], his wife, and the heirs male of such first son, with remainders over. AND WHEREAS the said [*bankrupt*] was the first son of the said [A. B.], by his said wife, and was on the —— day of ——, baptized at ——. AND WHEREAS the said [A. B.] died on the —— day of ——, and is buried at ——. Recital of sale. AND WHEREAS the said creditors' assignees (*c*), have contracted to sell the said hereditaments to the said [*purchaser*], for the price of £—— (*d*). Testatum. NOW

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disposing of the lands, whatever their tenure may be, to a purchaser for valuable consideration (vide ante, p. 292, n.) for the benefit of the creditors of the bankrupt, to be inrolled, within six calendar months, in respect to freeholds in Chancery, or in respect of copyholds with the court-rolls. (Ss. 56, 59.) Every disposition of copyhold lands, in which the estate of the bankrupt is not merely equitable, is to operate in the same manner as if such lands had been surrendered to the use of the purchaser, who may claim to be admitted accordingly upon payment of the fines demandable upon an admittance founded on a surrender. (S. 66.)]

[Where entailed freeholds and copyholds are sold together it is generally advisable to convey them by separate deeds, in order to avoid the expense of the double enrolment of a longer deed; and by so doing a saving may frequently be effected upon the apportionment of the stamp duty, which, in this instance, is of course to be impressed upon the deed of disposition. Vide ante, p. 537.]

(*b*) Recital of settlement of freehold. "WHEREAS, by indenture made the —— day of ——, between &c., the freehold hereditaments hereinafter described were settled to the use of [A. B.] for his life, with remainder to the use of [C. D.], who afterwards became his wife, for her life, with remainder to the use of the first son of the said [A. B.], by the said [C. D.], and his heirs male, with remainders over. AND WHEREAS, &c."

(*c*) [There is no ambiguity in this mode of reference, and it serves to shew that the parties are acting merely in the characters by which they are described.]

(*d*) If the sale was by auction the recital in the text will be sufficient, or the sale may be thus recited:—

Recital of sale by auction. "AND WHEREAS, at a sale by auction, on the —— day of ——, at ——, made by direction of the said creditors' assig-

85. FREEHOLDS OR COPYHOLDS OF BANKRUPT TENANT IN TAIL.

THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of £—— already paid (*e*) by the said [*purchaser*] to the said official assignee, for the benefit of the creditors of the said bankrupt, the said commissioner *Doth* bargain, sell, and dispose of (*f*), and the said [*bankrupt*] *Doth* ratify and confirm unto the said [*purchaser*] and his heirs, ALL (*parcels*), with all the appurtenants to the said hereditaments and premises, now or heretofore in fact or reputation belonging. AND all the estate, right, and title, both at law and in equity, therein or thereto of the said [*bankrupt*], or which he or any of the said disposing parties have any power to convey or dispose of. TO HOLD the said hereditaments and premises [free and discharged from all estates tail of the said [*bankrupt*] therein, and all estates, rights, titles, interests, and powers, to take effect after the determination or in defeazance of the same estates tail or any of them], unto and *to the use* of the said [*purchaser*], his heirs and assigns, for ever. AND each of them the said [*commissioner*], [*assignees*], and [*bankrupt*],

Commissioner and bankrupt convey parcels to purchaser.

Habendum.

Covenant against incumbrances.

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nees, the said [*purchaser*] was the highest bidder for and did purchase the said hereditaments at the price of £——."

(*e*) [The payment of the consideration-money to the official assignee is as conclusively stated and evidenced by these words, as it would be by the most formal expressions in the body of the deed. (Vide ante, p. 78). The formal words of discharge by the assignees are omitted, because they are perfectly useless; and they are not made to concur in the conveying part, because they have no estate in, or power over, the copyholds beyond the power of contracting for the sale of it. If the estates are of freehold tenure the operative words may be thus varied:—

Receipt for purchase-money.

"The said commissioners, official assignee, and creditors' assignees, *Do* respectively bargain, sell, and dispose of, and the said [*bankrupt*] *Doth* grant, bargain, sell, and confirm," &c.

Variation for freeholds.

(*f*) [For the form, where there is a protector who consents, vide ante, p. 295. When the protector consents by a separate deed to the disposition of the bankrupt's copyholds, the deed of consent must be executed by him either on or before the day of the execution of the disposition by the commissioner, and must be entered on the court-rolls; and the lord or steward is to indorse on the respective deeds of consent and disposition a memorandum of the entry thereof. 3 & 4 Will. 4, c. 74, s. 59. See a form of consent by a separate deed, ante, p. 286.]

Consent of protector.

85. FREEHOLDS OR COPYHOLDS OF BANKRUPT TENANT IN TAIL.

covenants with the said [*purchaser*] and his heirs, that the said covenanting party hath not been party or privy to any act or default whereby the said hereditaments and premises or any of them, are, is, or may be aliened, impeached, or encumbered. IN WITNESS &c.]

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86. BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

86. DEMISE *by a* TENANT *for* LIFE *to a* PURCHASER, *for* ONE HUNDRED YEARS, *if the* VENDOR *should so long* LIVE. *Special* COVENANTS *respecting the Power of* GRANTING LEASES, FELLING TIMBER, *&c.* (*Variation where the Conveyance is of the* WHOLE ESTATE FOR LIFE) (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part.

Recital of settlement;

WHEREAS, by indenture of release and settlement founded on an indenture of lease, and bearing date the —— day of ——, being of seven parts, and made between [*father*], (the father of the said [*vendor*], now deceased), of the first part; the said [*vendor*], party hereto, by the description of [*vendor*], the younger, the only son of the said [*father*], of the second part; [*wife*], of &c., of the third part; and other persons of the remaining parts (*b*);

Effect of alienation by tenant for life, upon his power of leasing.

(*a*) A reversion is left in the vendor, for the purpose of preserving his powers, pursuant to a suggestion, Sugd. Pow. 5th ed. 54. But, according to the case of *Long* v. *Rankin*, stated ante, Vol. 5, p. 163, there seems to be no necessity for this precaution, that case having decided that a power of leasing might be exercised by a tenant for life who had aliened his whole estate, unless the author of the power had indicated an intention, in a special manner, to annex it inseparably to the estate for life. In *Long* v. *Rankin*, however, there was an express stipulation that the tenant for life, notwithstanding his alienation, (the purpose of which was to secure an annuity), should be at liberty to grant leases, otherwise it is conceived the power would have been suspended in effect as against the persons interested under the charge created by the tenant for life, who could not be permitted to exercise his power in derogation of his own previous act.

(*b*) Where the recited deed has numerous parties, most of whom are joined for purposes extraneous to the object of the recital, it is convenient to refer to them in this manner.

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being the settlement executed previously to the marriage of the said [*vendor*], (party hereto), with the said [*wife*], (his now wife), in consideration of such marriage, and for other the considerations therein expressed, the hereditaments hereinafter described, and intended to be hereby demised (*c*), were (with other hereditaments) conveyed and do now stand limited *To the use* of the said [*vendor*], party hereto, and his assigns, during the term of his natural life, without impeachment of waste, with divers remainders over; in which indenture of settlement is contained (amongst other powers), a power enabling the said [*vendor*], (party hereto), and the several other tenants for life under the limitations therein contained, as they should respectively come into and be in possession of the estates thereby settled, from time to time during their respective enjoyments thereof, to demise the same for any term or terms of years not exceeding twenty-one years, in such manner and under such restrictions as were therein mentioned. AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*], (party hereto), for the absolute purchase of the said hereditaments hereinafter described, for the term of one hundred years, determinable with (*d*) the life of the said [*vendor*], (party hereto), and of all his right, power, and authority whatsoever, under and by virtue of the said indenture of settlement, of felling and cutting down all and every the woods, timber, and other trees standing, growing, and being, or to stand, grow, or be, in or upon the same hereditaments, or any part thereof (*e*), for the said term, determinable as aforesaid, and of selling and disposing of and converting the same for the sole use of him the said [*purchaser*], in the manner and subject to the condition and agreement hereinafter mentioned; together with the benefit of the said power of leasing, and of all other powers, rights, and authorities reserved to him the said [*vendor*], (party hereto), in, over, and upon the said hereditaments, by the said indenture of settlement, (except powers

—contract for purchase.

(*c*) If the conveyance is to be of the whole life estate—"released."

Variations when the conveyance is of the whole estate for life.

(*d*) If the conveyance is to be of the whole life estate, omit the five words preceding this reference, namely—"one hundred years, determinable with"—and vary the precedent generally in the text according to the subsequent notes.

(*e*) "during the life of the said [*vendor*], and of" &c.

86. BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

of jointuring and making provision for the younger children), at or for the price or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of the sum of £—— of lawful British money, by the said [*purchaser*] to the said [*vendor*], (party hereto), paid at or before the sealing and delivery of these presents, the receipt of which sum of £—— he, the said [*vendor*], doth hereby acknowledge, and therefrom doth absolutely discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, He, the said [*vendor*], (party hereto), *Doth*, by these presents (*f*), grant, bargain, sell, and demise unto the said [*purchaser*], his executors, administrators, and assigns, ALL THOSE several manors or reputed manors of (*parcels, with general words, ut ante, p.* 200); And all and every the yearly and other rents and profits of all and singular the said premises (*g*). TO HAVE AND TO HOLD the said hereditaments and premises intended to be hereby demised, unto the said [*purchaser*], his executors, administrators, and assigns (*h*), from the day of the date of these presents, during the full term of one hundred years thence next ensuing, (if the said [*vendor*], (party hereto), shall so long live), to his and their own use and benefit, without impeachment of or for any manner of waste, and with such power of felling and cutting down all and every the woods, timber, and other trees standing, growing, and being, and which, during the said (*i*) term, determinable as aforesaid, shall stand, grow, and be in or upon the said hereditaments and premises, or any part thereof, as is now vested in him the said [*vendor*], (party hereto), under and by virtue of the said indenture of settlement, or otherwise howsoever, or which he might have exercised or done in case these presents had not been made. *But so always and upon this express condition* and agreement, that

Testatum.

For a pecuniary consideration, vendor demises to purchaser.

Parcels.

Habendum to purchaser for one hundred years, if vendor so long live.

Limited power to fell timber, &c.

Variations, where the conveyance is of the whole estate for life.

(*f*) "made, (*&c., ut ante, p.* 72,) grant, bargain, sell, and release, unto the said [*purchaser*], his executors, and administrators, ALL THOSE" &c.

(*g*) "and all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of the said [*vendor*] in and to the said hereditaments."

(*h*) "henceforth during the term of the natural life of the said [*vendor*] to his and their own use" &c.

(*i*) "estate for life hereby released shall" &c.

86. BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

he the said [*purchaser*], his executors, administrators, or assigns, will not nor shall, at any time or times hereafter, fell, cut down, stub up, lop or top, or permit to be felled, cut down, stubbed up, lopped or topped, any timber or other tree or trees likely to become timber, standing, growing, or being, or which, during the said (*k*) term, determinable as aforesaid, shall stand, grow, or be in or upon the said premises, (other than and except such as are now marked and numbered, and the particulars whereof are indorsed on these presents, and subscribed by the said [*vendor*] and [*purchaser*], and other than and except such young shoots as may reasonably be drawn or removed for the general benefit of the timber, or as underwood; and other than and except such timber as shall be reasonably wanted for repairs); or do or commit, or permit or suffer to be done or committed, any unreasonable or wilful waste, spoil, or destruction, in or upon the said hereditaments and premises, or any part thereof. Together with the full benefit of all other powers, rights, and authorities reserved to or vested in him the said [*vendor*], in, over, or upon the hereby intended to be demised (*l*) premises, in and by the said indenture of settlement, (except the several powers of jointuring and making provision for younger children, therein mentioned), so far as he the said [*vendor*] is lawfully authorized and empowered to transfer and delegate the same. And the said [*vendor*], (party hereto), for himself, his heirs, executors, administrators, and assigns, doth covenant with the said [*purchaser*], his executors, administrators, and assigns, by these presents, in manner following, that is to say, that, notwithstanding any act, deed, matter, or thing whatsoever, by him the said [*vendor*], (party hereto), or the said [*father*], his late father, deceased, or [*former owner*], late of ——, also deceased, (the previous owner of the said hereditaments), done, executed, or suffered to the contrary, he the said [*vendor*], (party hereto), now is seised of all and singular the said hereditaments and premises hereby demised (*l*) or intended so to be, of or for a good and indefeasible estate of freehold, during the term of his natural life, in possession, without impeachment of or for any manner of waste, and with full power to commit waste; And without

Covenants by vendor,

that, notwithstanding &c., he stands seised,

(*k*) "estate for life hereby released, shall" &c.

(*l*) "released."

Variations, where the conveyance is of the whole estate for life.

86. BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

any condition, reservation, power of revocation, or other restriction, matter, cause, or thing whatsoever, to alter, determine, impeach, make void, or incumber the same; *And also*, that, notwithstanding any such act, deed, matter, or thing as aforesaid, he the said [*vendor*], (party hereto), now hath in himself full power and authority to grant and demise (*m*) the said several hereditaments, and premises unto the said [*purchaser*], his executors, administrators, and assigns (*n*), for the said term of one hundred years, determinable as aforesaid, according to the true intent and meaning of these presents; *And also*, that, notwithstanding any such act, deed, matter, or thing as aforesaid, he the said [*purchaser*], his executors, administrators, and assigns, shall, and lawfully may, at all times henceforth during the (*n*) said term of one hundred years, determinable as aforesaid, peaceably and quietly enter into and hold and enjoy the said hereditaments and premises, and receive the rents and profits thereof, for his and their own use; *And also*, fell, cut down, and sell and dispose of the said woods, timber and other trees, and exercise the aforesaid rights and authorities, (except as aforesaid), without any interruption of the said [*vendor*], (party hereto), or his assigns, or any other person or persons claiming by, from, or under the said [*father*], his late father, deceased, or the said [*former owner*], also deceased, or either of them; *And that* free and clear, and freely and clearly discharged, and by the said [*vendor*], (party hereto), his heirs, executors, or administrators, effectually kept indemnified from and against all estates, titles, charges, and incumbrances whatsoever, created or occasioned by him the said [*vendor*], (party hereto), or by the said [*father*], his late father, deceased, or the said [*former owner*], also deceased, or any of them, or by any other person or persons claiming by, from or under him, them, or any of them, or by or through the acts, means, consent, privity, or procurement of him, them, or any of them, (other than and except such leases as have been made in pursuance of the said power, and are now subsisting (*o*)); *And moreover*, that he the said [*ven-*

and has good right to grant;

—for peaceable enjoyment,

free from incumbrances;

—and for further assurance.

Variations, where the conveyance is of the whole estate for life.

(*m*) "release"

(*n*) "during the natural life of the said [*vendor*],"

(*o*) The rents reserved by these leases would pass by the present deed. The particulars of them should be obtained, unless the counterparts are delivered.

dor], (party hereto), and every other person lawfully claiming by, from, or under him, or by, from, or under the said [*father*], his late father, deceased, or the said [*former owner*], also deceased, or any of them, will and shall, from time to time and at all times during the (*p*) said term of one hundred years, determinable as aforesaid, upon the request and at the costs of the said [*purchaser*], his executors, administrators, and assigns, make, do, and execute all and every such further acts, deeds, and assurances for the more effectually demising (*q*) and assuring the said hereditaments and premises, (except as aforesaid), unto the said [*purchaser*], his executors, administrators, and assigns, during all the residue which shall be then unexpired of the (*r*) said term of one hundred years, determinable as aforesaid, according to the true intent and meaning of these presents, as by the said [*purchaser*], his executors, administrators, or assigns, or his or their counsel learned in the law, shall be reasonably devised or advised and required; so as &c., (*ut ante, p.* 77); *And further*, that he the said [*vendor*] (party hereto) will, from time to time and at all times hereafter during the (*s*) said term of one hundred years, determinable as aforesaid, if required, and he shall be deemed a necessary party, upon the request and at the costs of the said [*purchaser*], his executors, administrators, or assigns, depute and appoint, or join and concur with the said [*purchaser*], his executors, administrators, or assigns, in deputing and appointing, by all lawful and effectual ways and means, such person or persons as he or they shall nominate, choose, or recommend for that purpose, to be a gamekeeper or gamekeepers (*t*), bailiff or bailiffs, steward or stewards, or other officer or

86. BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

—and to join in appointing gamekeepers, &c.;

(*p*) "during the natural life of the said [*vendor*]," &c.

(*q*) "releasing."

(*r*) "estate for life of the said [*vendor*], hereby intended to be released, according" &c.

Variations where the conveyance is of whole estate for life.

(*s*) "term of his natural life, if required," &c.

(*t*) As to appointments of this nature, vide ante, Vol. 2, p. 548. By the statute 1 & 2 Will. 4, c. 32, lords of manors are entitled to the game on the waste, and are empowered to appoint gamekeepers for preserving and killing game for the lord's use, and also to appoint deputation gamekeepers to kill game for the use of the persons so deputed, or of any other persons specified in the appointment. The appointments are to be under hand and seal, and registered with the clerk of the peace.

Appointment of gamekeepers.

86. BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

officers, of or for all or any of the said manors and premises hereby demised (*u*); And also, at the will and pleasure of the said [*purchaser*], his executors, administrators, or assigns, remove or displace, or join in removing or displacing, any such gamekeeper, steward, bailiff, or other officer; and in like manner as aforesaid substitute and appoint any other person or persons (to be also nominated, chosen, or recommended for that purpose by the said [*purchaser*], his executors, administrators, or assigns) in the room of the officer so removed or displaced; And so from time to time, when and as often as he the said [*purchaser*], his executors, administrators, or assigns, shall think fit, during the continuance of his estate and interest in the premises as aforesaid, by virtue of these presents; *And likewise*, that he the said [*vendor*] (party hereto) will, during the said term of (*x*) one hundred years, determinable as aforesaid, at the like costs of the said [*purchaser*], his executors, administrators, or assigns, make and execute, or join and concur with the said [*purchaser*], his executors, administrators, or assigns, in making and executing all and every such lease and leases of all or any part of the said hereditaments and premises hereby demised (*y*), or intended so to be, as he the said [*purchaser*], his executors, administrators, or assigns, shall reasonably require; so as all such leases be made conformable to the said power vested in the said [*vendor*] (party hereto) in and by the said indenture of settlement, and to all and every the conditions and restrictions therein contained in that behalf; And will, from time to time, deliver, or cause to be delivered, counterparts of all such leases, executed by the respective tenants or lessees therein named, unto the said [*purchaser*], his executors, administrators, or assigns; *And also*, that it shall be lawful for the said [*purchaser*], his executors, administrators, or assigns, from time to time during the continuance of every such lease, (if the said (*y*) determinable term hereby granted shall so long endure), to receive and take to his and their own use all and every the rent and rents reserved upon such lease or leases respectively; *And also*, to make use of the name of the said [*vendor*] in the prosecution of any action or actions, or suit or suits, at law or in equity, in levying any distress or distresses,

—and to concur in making leases.

Variations where the conveyance is of the whole estate for life.

(*u*) "released."

(*x*) "his natural life, at the like costs," &c.

(*y*) "[*vendor*] shall so long live, to receive" &c.

86. BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

or in making any avowry or avowries, cognizance or cognizances, or in using any other lawful means for the purpose of enforcing payment of the rent or rents, and the performance of any of the covenants to be thereby and therein respectively reserved and contained, as effectually, to all intents and purposes, as the said [*vendor*] (party hereto) might or could have done if these presents had not been made. (*Also covenant by vendor to produce settlement, ut ante, p.* 447 (*z*)). AND the said [*purchaser*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant with the said [*vendor*], (party hereto), his executors, administrators, and assigns, that he the said [*purchaser*], his heirs, executors, administrators, and assigns, will and shall, at all times hereafter, keep harmless and indemnified the said [*vendor*], (party hereto), his heirs, executors, administrators, and assigns, and his and their goods, chattels, estates, and effects, of, from, and against all costs, damages, charges, and expenses which he or they shall pay or sustain by reason of the said [*vendor*] (party hereto) deputing and appointing, or joining or concurring in deputing and appointing, any gamekeeper, bailiffs, stewards, or other officers as aforesaid, or in removing or displacing them or any of them, and appointing others or other in their or his stead respectively, or making and executing such leases as last mentioned, and delivering or causing to be delivered counterparts thereof, executed as aforesaid, to the said [*purchaser*], his executors, administrators, or assigns, or by reason of the liberty hereby given to the said [*purchaser*], his executors, administrators, or assigns, to receive the rents to be reserved by such leases respectively, and to use the name of the said [*vendor*] (party hereto) in any other way, for compelling payment of the rents and performance of the covenants to be reserved and contained in such last-mentioned leases; And also, that he the said [*purchaser*], his executors, administrators, and assigns, will not nor shall, at any time or times during the (*a*) said term of one hundred years, determinable as aforesaid,

Covenant by purchaser to indemnify vendor from damages by reason

of his joining in the appointment of gamekeepers, or in making leases, &c.;

—not to cut any timber not specified in the indorsed memorandum, except for repairs;

(*z*) If the settlement is left in the possession of the vendor, a memorandum of the present deed ought to be indorsed upon it. Vide an observation, ante, p. 520. If any leases have been granted by the vendor, the counterparts of which are retained by him, the covenant for production should extend to them.

(*a*) "estate for life hereby released," &c.

86. BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

fell, cut down, stub up, lop, or top, or permit to be felled, cut down, stubbed up, lopped, or topped, any timber, or other tree or trees likely to become timber, standing, growing, or being, or which, during the same term (*b*), shall stand, grow, or be, in or upon the said hereditaments and premises, other than and except such as are now marked and numbered, and the particulars whereof are specified in the memorandum indorsed on these presents as aforesaid, and other than and except such layers and young shoots as may reasonably be removed for the general benefit of the timber, or as underwood, and other than and except such timber as shall reasonably be wanted for repairs; or make, do, or commit, or cause to be made, done, or committed, any unreasonable or wilful waste, damage, spoil, or destruction in, upon, or to the said hereditaments and premises, other than and except such as may be made by felling down and renewing the woods, timber and other trees hereby bargained and sold, according to the true intent and meaning of these presents. AND WHEREAS in the last spring the said [*vendor*] (party hereto) did cause to be fallen, in and upon the said lands and hereditaments intended to be hereby demised (*c*), a considerable quantity of timber then growing thereon, part whereof is now lying on the ground, and is intended to be removed as soon as the season will permit; Now the said [*purchaser*] doth hereby, for himself, his executors, administrators, and assigns, covenant with the said [*vendor*], (party hereto), his executors, administrators, and assigns, that it shall be lawful for the said [*vendor*], (party hereto), his executors, administrators, or assigns, at his and their free will and pleasure, henceforth from time to time, at seasonable times, to enter and come into and upon the said hereditaments and premises intended to be hereby demised (*c*), or any part thereof, with horses, carts, and carriages, and to remove and carry away the said timber now lying thereon as aforesaid, he the said [*vendor*], (party hereto), his executors, administrators, or assigns, doing as little damage thereby as may be, and using all proper and reasonable dispatch in removing the same. IN WITNESS &c.

or commit waste.

Recital of vendor having caused certain timber to be fallen.

Covenant by purchaser to permit him to remove it.

Variations where the conveyance is of the whole estate for life.

(*b*) "estate shall" &c.

(*c*) "released,"

87. ASSIGNMENT *of* LEASEHOLD *Dwelling-house and Garden, for a Term determinable with Lives, by three* SPECIFIC LEGATEES, *with the* CONCURRENCE *of the* EXECUTORS. (*Variation where the* VENDORS *are* RESIDUARY LEGATEES; *or where the Sale is by the* NEXT *of* KIN *on an Intestacy, with the* CONCURRENCE *of the* ADMINISTRATORS). *Also, where the* LEASE *is for* LIVES *absolutely.*

87. OF LEASEHOLDS DETERMINABLE WITH LIVES, OR FOR LIVES ABSOLUTELY, BY LEGATEES, &c.

THIS INDENTURE, made the —— day of ——, BETWEEN [*three vendors*], of &c., of the first part; [*executors*] (*a*), of &c., of the second part; and [*purchaser*], of &c., of

Parties.

(*a*) Or "[*administrators*]," as the case may be, unless, as the fact commonly is, the administrators are also next of kin, and then they will be included in the parties of the first part.

Administrators.

Under an intestacy, if the next of kin are numerous, some only of them take out administration, the practice of the Ecclesiastical or rather of the Prerogative Court, being not to make a grant to more than four. Where there are several persons of equal right the Court will grant administration to any one or more, (not exceeding four), without requiring any act of renunciation on the part of the others; though, of course, where the applicant for a grant is not *one* of the next of kin, it is necessary for them (the next of kin) to relinquish their prior title by renunciation.

As to the obtaining of letters of administration.

The precedent in the text supposes the legal and beneficial interest to be in different persons. Where executors or administrators, being also legatees or next of kin, possess in these several characters the entire legal and equitable ownership, their conveyance differs but little from that of any other absolute owners, though some practitioners, in such cases, are careful to make the vendors assign in their representative character, rather than as beneficial owners.

Observations upon the precedent in the text.

Where an executor or administrator sells leaseholds by virtue of his general power of disposition over the assets of the testator or intestate, the deed of assignment is of the simplest character. It merely recites the ownership of the deceased, the appointment of, and probate of the will by, the executors, or (in the case of an intestacy) the grant of letters of administration; and then the executor or administrator assigns, and covenants that he has not encumbered. It is unnecessary to state that the executor or administrator sells for the purpose of raising money to pay debts, as this is the presumed object of the sale, especially where the property which is the subject of disposition has been specifically bequeathed; though in such cases it is certainly usual, and perhaps better,

As to sales by executors or administrators.

87. OF LEASEHOLDS DETERMINABLE WITH LIVES, OR FOR LIVES ABSOLUTELY, BY LEGATEES, &c.

the third part. WHEREAS, by indenture bearing date on or about the —— day of ——, and made or expressed to be made between [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part; For the considerations therein mentioned, the said [*lessor*] did demise and lease unto the said [*lessee*], *All that* dwelling-house with the garden behind the same, situate and being on the —— side of —— street, at ——, in the county of ——, and then late in the occupation of ——, with the appurtenances, *To hold* to the said [*lessee*], his executors, administrators, and assigns (*b*), for the term of —— years, if [*three cestuis que vie*], or any of them, should so long live, under and subject to the yearly rents, covenants, and conditions therein contained on the part of the said [*lessee*], his executors, administrators, and assigns, to be paid, observed, and performed. AND WHEREAS the said [*lessee*] died on or about the —— day of ——, having first duly made and published his last will and testament in writing, bearing date on or about the —— day of —— (*c*),

Recital of lease;

—death and will of lessee.

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to recite the fact of the sale being made to enable the executor to pay the debts of the testator. It is always sufficient, however, that the contrary does not appear, and then the purchaser's title will be good against the specific legatee, unless the executor has assented to the bequest. The subject of sales by executors and legatees is very fully discussed ante, Vol. 5, p. 177. [And see ante, p. 61, n. (*t*). As to assent, vide ante, Vol. 3, p. 1; *Attorney-General* v. *Potter*, 5 Beav. 164.]

One of several executors competent to sell leaseholds.

One of several executors is competent to make to a purchaser an effectual assignment of a leasehold estate; but it is usual to require the concurrence of all. Vide ante, p. 138.

(*b*) If the lease is for lives, say—

Variations.

"during the natural lives of [*three cestuis que vie*], and the lives and life of the survivors and survivor of them, Under and subject" &c.

In this case the estate must have been created by some assurance adapted to *freehold* estates.

(*c*) If the lease is held for lives, and it is specifically devised, say—

"duly executed and attested for the devise of freehold estates."

As to estates pur auter vie, forming part of the residuary property.

If the property is not specifically devised, but passes to the vendors under the general residuary clause, the manner of the execution of the will, notwithstanding it may have been made prior to the year 1838, need not be noticed: for it was decided, in the case of *Ripley* v. *Waterworth*, 7 Ves. 425, that, though the Statute of Frauds required an attestation by three witnesses to a will disposing of estates pur autre vie, yet

87. OF LEASEHOLDS DETERMINABLE WITH LIVES, OR FOR LIVES ABSOLUTELY, BY LEGATEES, &c.

whereby he gave and bequeathed unto and equally between the said [*vendors*], their executors, administrators, and assigns, for their own respective use and benefit, the said dwelling-house and premises, for all the term, estate, and interest which he should have to come therein at the time of his decease (*d*). (*Recite appointment of executors, and pro-*

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an executor taking property of this kind as a special occupant was a trustee for the residuary legatees, though the will under which they claimed was not attested by three witnesses. Even where leaseholds for lives, devolving to the executors as special occupants, are specifically devised, as they are primarily liable in the hands of the executors to the payment of the testator's debts, their concurrence should be required in like manner as where the lease is for a term.

It will be obvious that the preceding observations apply only where the estate pur auter vie was limited to, or had become, for want of contrary words of limitation, vested in, the *personal* representatives of the testator; for if it were limited to his *heirs*, the executor or administrator would take no interest whatever in it. A will attested by three witnesses would have been requisite to prevent its devolution upon the heir as special occupant, though the property would be liable in his hands as assets by descent.

(*d*) If the sale is by residuary legatees—

Variation where vendors are residuary legatees.

"And thereby, after bequeathing several general and specific legacies, not including the said leasehold premises, gave and bequeathed all the residue and remainder of his personal estate and effects unto and equally between the said [*vendors*], their executors, administrators, and assigns, for their own respective use and benefit."

If by next of kin and administrators on an intestacy—

Recital that lessee died intestate;

"AND WHEREAS the said [*lessee*] died intestate on or about the —— day of ——, and letters of administration of all and singular the goods, chattels, and credits of the said [*lessee*] were, on the —— day of ——, granted to the said [*administrators*] by the Prerogative Court of the Archbishop of Canterbury.

—that vendors are next of kin.

AND WHEREAS the said [*vendors*] were the children [*or* brothers and sisters, *or* first cousins, *or otherwise as the case may be*] and only next of kin of the said [*lessee*] at the time of his decease, and as such are beneficially entitled to the said dwelling-house and garden, with the appurtenances, for the residue of the said term, determinable as aforesaid [*or* of the lives of the said [*cestuis que vie*], and the lives and life of the survivors and survivor of them, *as the case may be*]."

If it be deemed advisable to state the periods of birth and places of

87. OF LEASEHOLDS DETERMINABLE WITH LIVES, OR FOR LIVES ABSOLUTELY, BY LEGATEES, &c.

bate of the will by them). AND WHEREAS the said [*executors*] have assented to the bequest of the said dwelling-house and premises, so made by the said [*testator*] to the said [*vendors*] as aforesaid, as they the said [*executors*] do hereby acknowledge and declare, (testified by their severally executing these presents (*e*)). AND WHEREAS the said [*purchaser*] hath contracted and agreed with the said [*vendors*] for the absolute purchase of the said dwelling-house and premises, demised by the said indenture of lease, for the residue of the (*f*) said term of —— years determinable as aforesaid, at or for the price or sum of £——. And at the request of the said [*purchaser*], they the said [*executors*] have agreed to join in the assurance hereby made of the said dwelling-house and premises. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— of lawful British money to the said [*vendors*] paid by the said [*purchaser*] at or before the execution of these presents, the receipt of which sum of

—contract for purchase.

Testatum.

In consideration of purchase-money, vendors, and,

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baptism of the vendors, &c., in order to facilitate the future proof of these facts, proceed thus—

Places and times of baptism, &c. of vendors.

"AND WHEREAS the said [*first vendor*] was baptized at the parish church of ——, on the —— day of ——, the said [*second vendor*], at the same place, on the —— day of ——, and the said [*third vendor*], at the same place, on the —— day of ——; and their parents [A. B.] and [C. D.], were married at the parish church of ——, on the —— day of ——."

This would be sufficient if the next of kin were the children of the intestate; if they were more remote relations, the proof of their relationship would embrace a wider range of facts, which might be shewn by an indorsed pedigree. This is also a convenient mode where a conveyance is made by an heir, who is a remote collateral relation of the person last seised.

(*e*) As there is some doubt whether the assent of an executor will vest in a residuary or general legatee leaseholds forming part of the residuary or general personal estate, it is proper, where the sale is made by residuary or general legatees, to omit this recital. Where the vendors are entitled as the next of kin of the late intestate owner, it is of course altogether inapplicable.

(*f*) If the lease is for lives, say—

Variations.

"lives of the said [*cestuis que vie*], and the lives and life of the survivors and survivor of them, at or for" &c.

£—— they the said [*vendors*] respectively do hereby acknowledge, and from the same sum do acquit, release, and discharge the said [*purchaser*], his executors, administrators, and assigns; and also in consideration of the sum of 10*s.* of lawful money aforesaid to each of them the said [*executors or administrators*] at the same time paid by the said [*purchaser*], the receipts whereof respectively are hereby acknowledged, They the said [*vendors*] *Do*, and every of them *Doth*, by these presents (*g*), grant, bargain, sell, and assign over, And the said [*executors or administrators*], at the request and by the direction of the said [*vendors*], testified by their severally executing these presents, *Do*, and every of them *Doth*, by these presents, bargain, sell, assign, and transfer unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT the said dwelling-house, with the said garden and all and singular other the premises mentioned in or demised by the said indenture of lease, or intended so to be, with all the actual and reputed appurtenances thereto; Together with the said indenture of lease. *And* all the estate, right, title, interest, term of years yet to come and unexpired, property, claim, and demand whatsoever, both at law and in equity, of every of them the said [*vendors*] and [*executors or administrators*], in, to, and upon the said dwelling-house and garden hereby assigned, or intended so to be, with the appurtenances. TO HAVE AND TO HOLD the said dwelling-house and other premises intended to be hereby assigned (*h*), unto the said [*purchaser*], his executors, administrators, and assigns, henceforth (*i*) during all the residue

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for nominal consideration, executors, assign.

Parcels;

—and all the estate, &c.

Habendum.

(*g*) If the lease is for lives, say—

"by these presents, made &c., (*ut ante, p.* 72), grant, bargain, sell, and release; And the said [*executors or administrators*] *Do*, by these presents, bargain, sell, and release," &c.

Variations.

If the administrators are some of the next of kin, no separate act of assurance by them in their representative character will be necessary.

(*h*) If the lease is for lives, the word "assigned," will be changed to "released," throughout the precedent.

(*i*) If the lease is for lives, say—

"during the natural lives of the said [*cestuis que vie*], and the lives and life of the survivors and survivor of them, and for all other the estate and interest granted by the hereinbefore-recited indenture of lease, subject" &c.

87. OF LEASEHOLDS DETERMINABLE WITH LIVES, OR FOR LIVES ABSOLUTELY, BY LEGATEES, &c.

now unexpired of the said term of —— years, determinable as aforesaid, granted by the said indenture of lease, and for all other the estate, term, and interest, if any, of the said [*vendors*] and [*executors or administrators*] respectively, under or by virtue of the same indenture; subject, nevertheless, to the rents, covenants, conditions, and agreements in the said indenture of lease reserved and contained, and which, by the lessee, his executors, administrators and assigns, are and ought to be henceforth paid, observed, and performed. (*Covenant by executors or administrators, that they have not encumbered, ut ante, p.* 274 (*k*)).

Covenant by vendors, limited to their respective third parts,

And the said [*vendors*] do hereby, for themselves respectively, and their respective heirs, executors, and administrators, but each of them so far as relates to and concerns one undivided third part of the said dwelling-house and premises, intended to be hereby assigned, and as to and concerning only the acts, deeds, title, and defaults of himself and the said [*testator or intestate*], deceased, relating thereto, do severally covenant and agree with the said [*purchaser*], his executors, administrators, and assigns, That, notwithstanding any act, deed, matter, or thing, made, done, executed, or suffered to the contrary by them the said [*vendors*], or by the said [*testator or intestate*], deceased, the said indenture of lease now is a good and effectual lease for all the premises therein mentioned, for and during (*l*) the residue now unexpired of the same term, determinable as aforesaid, thereby expressed to be granted, and is not surrendered, forfeited, or become void or voidable, and that none of the covenants therein contained are broken or unperformed in any manner howsoever; And that, notwithstanding any such act, deed, matter, or thing as aforesaid, they the said [*vendors*] and [*executors or administrators*] now have, or some or one of them have or hath in themselves or himself, full power and absolute authority to sell and assign the said dwelling-house

that, notwithstanding &c., lease is valid;

Covenant against incumbrances.

(*k*) Where the executors or administrators, in whom the legal estate of the entirety is vested, are beneficially entitled to an aliquot share, and covenant for the title in regard to that share, they ought also to enter into the usual trustees' covenant that they have not incumbered the *entirety*.

Variations.

(*l*) If the lease is for lives, say—

"the natural lives of the said [*cestuis que vie*], and the lives and life of the survivors and survivor of them, and is not surrendered" &c.

and premises, and the said indenture of lease, to the said [*purchaser*], his executors, administrators, and assigns, during the (*m*) residue of the said term of —— years, determinable as aforesaid, in manner aforesaid, and according to the true intent and meaning of these presents; And that he the said [*purchaser*], his executors, administrators, and assigns, shall or lawfully may from time to time henceforth during the (*n*) residue now unexpired of the said term of —— years, determinable as aforesaid, granted by the said indenture of lease, peaceably and quietly hold and enjoy the said dwelling-house and premises, and receive and take to his and their own use all the rents, issues, and profits thereof, without any lawful eviction, disturbance, or interruption of or by them the said [*vendors*], or any of them, or the executors or administrators of them or any of them, or any other person or persons whomsoever lawfully claiming by, from, through, under, or in trust for them or any of them, or by, from, through, under, or in trust for the said [*testator or intestate*], deceased, or by the acts, means, neglect, or procurement of him, or them, or any of them; *And* free and clear, and freely and clearly acquitted and discharged, or by them the said [*vendors*], their heirs, executors, or administrators, well and effectually kept indemnified of, from, and against all and all manner of former gifts, grants, bargains, sales, assignments, surrenders, forfeitures, rents, arrears of rent, charges, or incumbrances whatsoever, made, occasioned, or suffered by him, her, or them, or by the said [*testator or intestate*], deceased, or by the acts, means, neglect, or procurement of him, them, or any of them; *And lastly*, that they the said [*vendors*] respectively, and their respective executors or administrators, and every other person lawfully claiming any estate, right, title, or interest in, to, or out of the said dwelling-house and premises, by, from, or under them respectively, or by, from, or under the said [*testator or intestate*], deceased, will and shall, from time to time, and at all times hereafter, upon the request and at the

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—for peaceable enjoyment,

free from incumbrances;

—for further assurance.

(*m*) If the lease is for lives, say—

"the natural lives of the said [*cestuis que vie*], and the lives and life of the survivors and survivor of them, in manner" &c. Variations.

(*n*) "natural lives of the said [*cestuis que vie*], and the lives and life of the survivors and survivor of them, peaceably" &c.

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costs of the said [*purchaser*], his executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and executed, all and every such further acts, deeds, assignments, and assurances in the law whatsoever, for the more effectually assigning and confirming the said dwelling-house and premises unto the said [*purchaser*], his executors, administrators, and assigns, during the residue which shall be then unexpired of the (*o*) said term of —— years, determinable as aforesaid, As by the said [*purchaser*], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised or devised and required, so that &c., (*ut ante, p.* 77); *And the* said [*purchaser*] doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said [*vendors*], their executors and administrators, and each of them jointly and severally, that he the said [*purchaser*], his executors, administrators, or assigns, will or shall from time to time henceforth pay the rent and observe and perform the covenants and agreements on the part of the lessee, his executors, administrators, and assigns, in the said indenture of lease reserved and contained, and will or shall at all times hereafter effectually keep indemnified the said [*vendors*] respectively, and their respective heirs, executors, and administrators, and also the heirs, executors, or administrators for the time being of the said [*testator or intestate*], deceased, from and against all actions, suits, costs, charges, expenses, claims, and demands whatsoever, which shall or may be prosecuted or made against or upon or incurred by them or any of them, by reason or on account of the non-payment or non-performance from henceforth of the same rent, covenants, and agreements respectively, or in relation thereunto. IN WITNESS &c.

Covenant by purchaser to pay rent and perform covenants of lease.

Variations.

(*o*) If the lease is for lives, say—

" natural lives of the said [*cestuis que vie*], and the lives and life of the survivors and survivor of them, As by " &c.

88. DEED *of* ENFRANCHISEMENT *of* COPYHOLDS *by the Lord of a Manor to his Tenant* (*a*). 88. ENFRANCHISEMENT OF COPYHOLDS.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c. (*b*), of the one part; and [*purchaser*], of &c., of the other part. WHEREAS the said [*vendor*] is seised to him and his heirs, in fee-simple in possession, free from all incumbrances, of the manor of ——, in the county of ——; and the said [*purchaser*] is seised to him and his heirs, at the will of the lord, according to the custom of the said manor, of all and singular the copyhold hereditaments hereinafter described (*c*). AND WHEREAS the said [*vendor*] —contract for

Parties.

Recital of seisin;

(*a*) A deed of enfranchisement is framed either as a conveyance from the lord to the copyholder of the land which is the subject of it, or merely as a release of the seignorial right. The former is more commonly adopted. The lord can only enfranchise to the extent of his estate; and, therefore, it is incumbent on the copyholder, who gives a valuable consideration for the enfranchisement, to ascertain the lord's competency, with respect to estate, to make it. But where the copyholder has a limited interest only, the lord's grant to him enures [at least in equity] to the benefit of the persons entitled in remainder or reversion. *Wynne* v. *Cookes*, 1 B. C. C. 515. See Scriven on Copyholds, 408; [infra, p. 577.]

As to the enfranchisement of copyholds.

It seems to be the better opinion, that a copyholder accepting enfranchisement from the lord brings upon his estate any incumbrances affecting the manor. [Vide ante, Vol. 1, p. 639. The expedient suggested by Mr. Preston, in the passage there cited, of creating a term of years out of the copyhold tenure, prior to the enfranchisement, that the title to the possession may depend on that tenure, seems to be supported by what was said in *M. Podger's case*, 9 Rep. 107, where a copyhold having been granted to A., B., and C. successivè for their lives, the lord bargained and sold the freehold to A. and his heirs; and it was said, that if the lord had charged the inheritance, A. should not hold it charged during his life, for the mesne estates in remainder would defend him. The better plan, however, would be either to surrender the entire inheritance in the copyhold to a trustee, or to take the conveyance of the lord's freehold to a trustee, as in *Dancer* v. *Evett*, 1 Vern. 392. But see the doubts as to the effect of this, infra, p. 578.]

As to protection against the lord's incumbrances.

(*b*) [If the lord is married, and his wife is entitled to dower, she must join in and acknowledge the deed. Vide ante, p. 162.]

(*c*) It is better to avoid encumbering a deed of this kind with unnecessary statements of title, as it increases the expense of inrolment.

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enfranchisement.

hath contracted with the said [*purchaser*], that, for the consideration hereinafter mentioned, the said hereditaments shall be enfranchised, and from henceforth for ever hereafter absolutely freed and discharged from all and all manner of fines, heriots, rents, suits, services, and customs whatsoever, and be and continue as freehold.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and also in consideration of the sum of £——, of lawful British money, to him the said [*vendor*] at or before the sealing and delivery of these presents in hand paid by the said [*purchaser*], the receipt whereof the said [*vendor*] doth hereby acknowledge, and of and from the same doth acquit and discharge the said [*purchaser*], his heirs, executors, and administrators for ever, by these presents; The said [*vendor*] *Doth* by these presents grant, bargain, sell, enfranchise, release, and quit-claim (*d*), unto the said [*purchaser*], his heirs and assigns, ALL THAT (*parcels*); And also all ways, &c.; And the reversion, &c.; And all the estate, &c.; (*reservation of minerals, if intended, ut ante, p.* 521). TO HAVE AND TO HOLD the same hereditaments and premises, expressed or intended to be hereby granted and enfranchised, unto the said

In consideration of a sum of money, lord grants &c. to copyholder.

Parcels.

Habendum.

What words amount to an enfranchisement.

(*d*) [Any words expressing an intention to put an end to the seignorial rights will be sufficient. Thus, where the lord ratified and confirmed to the tenant and his heirs all his customary estates; and granted and covenanted that the tenant and his heirs should be for ever thereafter freed, acquitted, exempted, and discharged from the payment of all rents, fines, services, &c. whatsoever, in respect of his tenancy, (excepting only one penny yearly rent, to be paid to the lord of the manor for the time being; and excepting and reserving suit of court, with the service incident thereto, and all royalties, escheats, and forfeitures for felonies, &c., and all other advantages and emoluments belonging to the seignory, so far as might consist with the aforesaid immunities granted to the tenant); and the lord covenanted that the tenant might alien, mortgage, or lease his tenement without the lord's consent or license; it was held that this amounted to an enfranchisement, being tantamount to a release of the services; for "where words are equivalent in substance to words of release, the law takes them as a release; and where there are words of substance, the law appoints how they shall enure." (Plowd. 140). *Doe* d. *Reay* v. *Huntingdon*, 4 East, 270. In that case Lord Ellenborough expressed an opinion that the customary estate consisted of all the services; so that a release of some of them, reserving others, would be sufficient to destroo the custom. And this opinion, though not, perhaps, necessary to the decision, seems to be supported by the early cases. See *Griffith* v. *Clarke*, Moore, 143: *Doe* d. *Newby* v. *Jackson*, 1 B. & Cr. 448. But see *Bradshaw* v. *Lawson*, 4 East, 443, infra, p. 577.]

[*purchaser*], and his heirs, To THE USE of him the said [*purchaser*], his heirs and assigns, for ever (*e*); To the end and intent that the copyhold tenure of the said hereditaments and premises may become and be extinguished, and the same may for evermore be held and enjoyed in free and common socage, freely, clearly, and absolutely enfranchised, exonerated, acquitted, and discharged, by these presents, of and from all and all manner of yearly and other payments, rents, quit-rents, chief-rents, customary or copyhold rents, fines, heriots, fealty, suit of court, and all other usual or customary or copyhold payments, duties, services, or customs whatsoever, which, according to the custom of the said manor of ——, the said hereditaments and premises, or any of them, are or is, or have or hath been, or ought otherwise to be, subject or liable to be charged with, or which otherwise ought to be paid, done, or performed for or in respect of the said hereditaments and premises, or any of them, or any part thereof, as copyhold, holden of or parcel of the said manor; [*Provided always* (*f*), and it is hereby declared and agreed, that nothing herein contained shall enfranchise, acquit, or discharge any tenements or hereditaments held by the said [*purchaser*] of the said [*vendor*], as lord of the said manor, other than and except the hereditaments hereinbefore particularly described, and hereby granted and enfranchised, or intended so to be, of or from the copyhold tenure, or of or from any rents, payments, heriots, suits, customs, or services incident thereto, or to be rendered or performed in respect thereof.] AND THIS INDENTURE FURTHER WITNESSETH, that, for the considerations aforesaid, and in order to preserve to the said [*purchaser*], his heirs and assigns, all such right of common in and over the wastes of the said manor of ——, as he the said [*purchaser*] hath heretofore used and enjoyed (*g*), as belonging or appurtenant to the

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To the use of purchaser.

To the intent that lands may be enjoyed, discharged from services, &c.

Proviso, that enfranchisement shall not extend to other lands.

Further testatum.

(*e*) [All that follows this reference, down to the commencement of the further testatum, may very properly be omitted, for the sake of brevity.]

(*f*) Where the grantee holds other tenements, parcel of the manor, which are not intended to be enfranchised, this proviso is usually, though, it is apprehended, unnecessarily, inserted.

(*g*) [As to the effect of enfranchisement on the copyholder's right of common, vide ante, Vol. 1, p. 641. If the copyhold is kept on foot, as suggested, ante, p. 573, the grant of the rights of common, although, as a measure of prudence, it should be retained, would seem to be unne-

As to rights of common.

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hereditaments and premises hereinbefore described, notwithstanding the enfranchisement of the same hereditaments. The said [*vendor*] *Doth*, by these presents, grant and confirm unto the said [*purchaser*], his heirs and assigns, for ever, all such commonage and right or title to common, of what nature soever, in, over, or upon all or any of the wastes, commons, and commonable lands of or belonging to the said manor of ——, as he the said [*purchaser*] held and enjoyed in respect of the hereditaments and premises hereinbefore described, and hereby granted and enfranchised, or intended so to be, or any of them, immediately before the execution of these presents, and the freehold and inheritance thereof, in as large, ample, and beneficial a manner, to all intents and purposes, as the said [*purchaser*] hath heretofore used and exercised all or any such rights, or as he or his heirs or assigns could or might have used and exercised the same, in respect of the said hereditaments and premises, or any of them, if the same had continued to be parcel of the said manor.

Grant of right of common formerly appurtenant to the estate.

Covenants.

(*Add usual vendor's covenants, that, notwithstanding &c., he hath power to grant; for quiet enjoyment* (*h*); *free from incumbrances; and for further assurance, ut ante, p.* 165 (*i*)). IN WITNESS &c.

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cessary. Where there is a merely temporary extinguishment or suspension of the copyhold, the right of common is, of course, not permanently destroyed, and will revive upon a new grant of the copyhold being made. *Badger* v. *Ford*, 3 B. & Ald. 153.]

Enfranchisement under a power.

[The re-grant of common should be inserted, whether the lord is tenant in fee or only tenant for life exercising a power; for it is clear that such an expression of intention would be effectual, at least in equity. Ante, Vol. 1, p. 641. There seems to be no peculiarity in an enfranchisement under a power; it is merely an authority to appoint the legal freehold to the copyholder, and seems to be included in the ordinary power of sale.]

(*h*) Some gentlemen introduce special words of qualification into the covenants, to prevent their operating as a warranty of the right of common newly granted, against disturbance by any of the commoners.

(*i*) If the lord covenants for the production of the title-deeds of the manor, the covenant should be contained in a separate deed. In future dealings with the property, both the freehold and copyhold titles must be deduced down to the period of the conversion of the tenure. The deed of enfranchisement should be inrolled on the court-rolls of the manor, though this is no otherwise important than for the purpose of preserving additional evidence of the transaction, and, for this purpose, a short memorandum would be sufficient.

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[Enfranchisement is a conveyance or release by the lord or his alienee (*Lane's case*, 2 Rep. 16) to the tenant, (either by feoffment and writing, or by deed operating as a conveyance of the freehold, or as a release), of the freehold estate in, or of the seignorial rights over, the particular copyhold lands; whereupon the lands are severed from the manor, and the tenant becomes seised of them in free and common socage, as tenant to the superior of whom the lord holds the manor, and not as a freeholder liable to do suit to the lord's court-baron. *Bradshaw* v. *Lawson*, 4 T. R. 443. Being in the nature of a release of the freehold reversion expectant on the tenant's estate at will, it is effectual only to the extent of the lord's estate, and if the latter is partial or defeasible, upon its determination the customary tenure revives. *Conesbie* v. *Rusky*, Cr. El. 459*; 2 Roll. Ab. 271: *Doe* d. *North* v. *Webber*, 5 Scott, 189. A dictum in *Lee* v. *Boothby*, Cro. Car. 521, contrà, is clearly erroneous. It seems that the want of a formal admittance would in most cases be immaterial; because admittance is merely an acknowledgment of the tenure by the lord; and the act of enfranchisement must almost always amount to a sufficient recognition of the tenure for that purpose. See *Wilson* v. *Allen*, 1 Jac. & W. 611.]

Nature of an enfranchisement.

Not extended beyond the lord's estate.

Necessity of admittance.

[It is laid down that where the copyholder is tenant for years, for life, or in tail, the enfranchisement operates to extinguish the customary tenure for ever, and therefore to pass the absolute fee-simple out of the lord. This position, however questionable in principle as to the effect on the copyhold tenure, is certainly not entirely unsupported by authority; but whether the particular tenant takes the whole fee-simple, or whether the enfranchisement enures at law to the benefit of those in remainder, does not appear to be settled. The difficulty arises rather from the cases than from the principles involved in the question, which are simple and of obvious application. Enfranchisement is a particular case of *extinguishment* of a copyhold, distinguished from other cases of extinguishment only by the circumstance that the copyholder acquires in lieu of his copyhold estate some estate of freehold. Extinguishment is the union of the common-law and customary titles in the same person. Some extinguishments destroy the tenure irretrievably and for ever; others are only temporary or avoidable. If the extinguishment happen by an escheat or surrender of the copyhold to the lord, the lands remain parcel of the manor and subject to the custom, and may at any future time be re-granted or re-demised to hold by copy as before; but if once the particular lands become separated from the manor during the extinction, or rather suspension of the tenure, they can never afterwards be granted to hold by copy, unless by a lord, who, claiming as remainderman or by title paramount, is not bound by the acts of the former lord, or where the extinguishment has arisen from a union of the interests in different rights, as where the lord or lady marries a copyholder. Co. Copyh., s. 62; *Anon.*, Cr. El. 8; *Conesbie* v. *Rusky*, Cr. El. 459; *Bingham* v. *Woodgate*, 1 Russ. & M. 32. See 5 Mau. & S. 155. Thus, if the lord, being seised in fee, enfeoff a stranger of the particular lands in fee, and the copyholder surrender to the use of the feoffee, the demisable quality of the copyholds is gone for ever; and as the customary estate cannot pass without the assent of the lord, it should seem that the same effect would be produced by a surrender to the use of his lessee

Enfranchisement where the copyholder has not the fee-simple.

Extinguishment.

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for life or years, as it would where, the copyhold having been got into the hands of the lord himself, he makes a lease for life or years to a stranger. *Lee* v. *Boothby*, Cro. Car. 521. The doctrine is thus laid down and illustrated in *French's case*, 4 Rep. 31 :—

French's case. What is a permanent extinction of the tenure.

["It was adjudged, that, if a copyhold estate is forfeited to the lord, or escheats, or otherwise comes to the lord's hands, if the lord makes a lease for years, (*Lane's case*, 2 Rep. 17), or for life, of the estate, by deed or without deed, that this land can never after be re-granted by copy, for the custom is destroyed, because during such estates the land was not demised nor demisable by copy of court-roll. So, if the lord makes a feoffment in fee thereof upon condition, and afterwards enters for the condition broke, yet it can never be re-granted by copy ; but if the lord keeps the land in his hands for a long time, or lets it *at will*, he, his heirs or assigns, may well re-grant it at his pleasure. So, if the interruption is wrongful, as if the lord is disseised, and the disseisor dies seised, or if the land is recovered against the lord by false verdict or erroneous judgment, in these cases, till the land is recovered or the judgment reversed by the lord of the manor, the land was not demised or demisable, and yet after the land is re-continued, it is grantable again by copy, for non valet impedimentum quod de jure non sortitur effectum ; et quod contra legem fit pro infecto habetur : but if the land so forfeited or escheated before any new grant made is extended upon a statute or recognizance acknowledged by the lord, or if the wife of the lord in a writ of dower has this land assigned to her, although these impediments are by acts in law, yet, inasmuch as the interruptions are lawful, the lands can never after be granted by copy. If a copyholder accepts a lease for years of the lord of his copyhold, the copyhold is destroyed for ever, and can never be re-granted again. If the copyholder takes a lease for years of the manor, by *that* his copyhold has not continuance, as it was adjudged, Pasch. 17 Eliz., in *Hide's case*, (Moore, 185, 2 Rep. 17 a) ; but in the same case it was resolved that such lessee might re-grant the copyhold again to whom he would, for the land was always demised or demisable. And if a copyhold is surrendered to the lessor [lessee] of the manor, or is forfeited to him, he or his executors or assigns may well re-grant it ; and if a copyhold escheats to the lord, and he aliens *the manor* by fine, feoffment, or otherwise, his alienee may re-grant the land by copy, for it was always demised or demisable." See *Revell* v. *Jodrell*, 2 T. R. 415.]

Effect of conveyance of the freehold by the lord to a stranger. *Murrel* v. *Smith.*

[To what extent the alienation of the freehold by the lord of the manor shall affect the copyholder, is not clear. It is settled, that it shall not prejudice the title of the copyholder and his heirs ; *Lane's case*, 2 Rep. 166 ; *Bell* v. *Langlye*, 4 Leon. 230 ; or the dower of his wife. *Waldoe* v. *Bertlet*, Cro. Jac. 573 ; Hob. 131. In *Murrel* v. *Smith*, 4 Rep. 24, the queen, being seised of the manor of B., granted parcel of it, being antient copyhold, to S. in fee, and afterwards granted the inheritance [freehold] of the said copyhold to a stranger in fee. Afterwards, S. surrendered the copyhold to the Queen, to the use of his will. The heir having entered, it was held, in trespass by the devisee, that the surrender was inoperative. It is said to have been resolved, 1. That custom has so established the estate of a copyholder, that, by the severance of the inheritance of the copyhold from the manor, the copyhold

After the freehold is severed, copyholder cannot surrender or alien his estate.

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is not destroyed, for, inasmuch as the lord cannot oust the copyholder, no more can any one claiming under him do it. 2. That in this case the copyhold descended to the heir, and the surrender was void, because the lands were not parcel of the manor at the time. 3. That after the severance the copyholder shall pay his rent to the feoffee, and also shall pay and do other services which are due, without admittance or holding of any court, as to plough the lord's demesnes, heriot, &c. But suit of court, and fine upon alienation or admittance, are gone, *for now the land or tenement cannot be aliened*, [acc. Co. Copyh. s. 37 ; *Howard* v. *Bartlet*, Hob. 131] ; for as the copyholder has some benefit by this severance, so he has great prejudice, for now he cannot surrender or alien his estate. And it was held that forfeitures for waste, making a feoffment lease, &c., might still be incurred, [*East* v. *Harding*, Cr. El. 499]. And it was said, if such copyholder will alien, there is no means but to have a decree against him and his heirs in Chancery ; but thereby the interest of the land is not bound, but the person only. In the short note of this case in Cr. El. 252, referring to 4 Rep. 24, we find, "And Fenner, J., said, that he might surrender his estate to the grantee of the freehold to the use of the grantee, for he had the reversion, but could not surrender to the grantee to the use of another ; nor the grantee cannot grant it by copy to another ; so the copyholder must always keep it in his hand. But quære of this, and the other justices gave no opinion on this point." See Gilb. Ten. 208 ; *Beale* v. *Langley*, 2 Leon. 208.]

Melwich v. *Luther*. Grantee of the freehold of many copyhold tenements may take surrenders and make re-grants by copy.

[In *Melwich* v. *Luther*, 4 Rep. 26 ; Cr. El. 102, however, the law is laid down quite differently. A manor belonging to a monastery having come to the king's hands, he granted the inheritance of all the copyholds of the manor in E. to J. O. and his heirs, who called it his manor of E. One of the tenants having surrendered his tenement to J. O., the latter granted it by copy to the lessor of the plaintiff, and it was held that this grant bound those claiming under J. O. It was resolved, that, where the lord of the manor, having many antient copyholds in one town, (see *Harris* v. *Nicholls*, Cr. El. 19), grants the inheritance of all the copyholds to another, the grantee may hold court, take surrenders, and make admittances and grants, though, for want of freeholders, it is no manor at law. And Lord Coke adds, "Nota, reader, although the lord by his own act cannot make of one and the same manor at the common law sundry manors consisting upon demesnes and freeholders, yet he may by his own act, as by this judgment appears, make a customary manor consisting upon copyholders only, as to the purposes aforesaid." In the report in Croke, the judges are made to say, that he who hath the freehold may keep a court in any place, and it is not properly a court-baron, but as a court of survey, at which copyholds may be well granted. The reporter adds, that the case was compounded, but the judges in the Exchequer Chamber were clearly of opinion that the copyholds were no longer demisable. If by a grant of all the copyholds in one town this may be done, there can be no reason or principle why it should not be done by a grant of a single copyhold; for, although the *steward* could not (before the stat. 4 & 5 Vict. c. 35, s. 88, ante, p. 192) admit out of court, or out of the manor, (*Doe* d. *Roberts* v. *Whitaker*, 3 Nev. & M. 225), the lord might always have done so ; and, besides, the lord or steward alone could constitute

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Neale's case.

a court, at least for the purposes of alienation, although there might be no copyholders present, or even in existence. See Co. Litt. 58. a., 4 Rep. 26; Gilb. Ten. 250; 4 T. R. 445. However, in *Neale's case*, 4 Rep. 26; *Jackson* v. *Neale*, Cr. El. 395, where it was held that a lessee for years of all the copyholds in a manor might hold courts, Coke says, "Nota, reader, a good difference between these cases, which consist upon numbers of copyholds which may support a custom, and one single case of a copyhold, as in *Murrel's case*, in which the lord did not grant tacite any customary court, nor the grantee, having but one single copyhold, cannot hold court." Croke states the case as of a demise of *two* of the copyholds only, and of the court-baron, reserving the other demesnes and services.]

[In *Lord Davies' case*, 1 Leon. 280, per Ayliff, J., "If the lord of a manor makes a feoffment of a parcel of his manor, which is holden by copy for life, and afterwards the copyholder dieth, although now the lord hath not any court, yet the feoffee may grant over the land by copy again."]

Bright v. *Forth.*

Distinction as to copyhold for lives.

[In *Bright* v. *Forth*, Cr. El. 443, the Court said that *Melwich* v. *Luther* was a strange judgment, never entered, and disapproved of in error. But they took a distinction between copyholds for lives, which they held were clearly not grantable after a severance, and copyholds of inheritance, as to which the judges differed, some appearing to think that they might be surrendered and re-granted, others, that they must remain in the copyholder and his heirs. But as Anderson and Beaumont, JJ., are represented as agreeing that a lord cannot take a surrender out of court, the accuracy of the report may well be questioned.]

Remarks on the cases.

[It is admitted in all the cases, that the severance of the freehold does not destroy a copyhold of inheritance, or affect the title of the copyholder and his *heirs*. But as the law will not allow of a perpetuity, it may be asked how the customary estate is to be assigned, if not by the customary mode of surrender and grant? That the tenant or his heir, and the freeholder together, may make a good title at the common law, (vide ante, p. 349), is no answer to this objection, for it is clearly against the policy of the rule that the owner of an estate or interest in land should be for ever restricted, if he wish to sell it, to one market or one purchaser. And if the copyholder were tenant in tail, and the opinion of Lord Mansfield in *Dunn* v. *Green*, infra, p. 581, could be supported, the rule against perpetuities would be still more strikingly infringed; for, of course, unless the lord's alienee is competent to take a surrender there is no means of barring the entail.]

Whether copyholder for a particular estate can destroy the tenure for ever.

["If a copyholder in fee surrender to the use of the lord for life, the remainder over to a stranger, or reserveth the reversion to himself, if the lord will grant this by copy in fee, whatsoever estate the lord hath in his manor, yet, having but an estate for life in the copyhold, no larger estate shall pass." Co. Copyh., s. 34. It follows from this, by necessary inference, that, if the owner of a particular estate in a copyhold surrender to the lord, or to the lord's grantee of the freehold in that tenement, the copyhold shall be extinguished only during the particular estate; and the rule that contingent remainders in a copyhold cannot be destroyed by any surrender or other act of the particular tenant (sed

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vide *Roe* v. *Briggs*, infra, p. 582) entirely accords with this conclusion. Hence it should follow, that, if the lord release the seignory or the freehold to the particular tenant, this shall only be an extinguishment or an enfranchisement pro tanto. Thus, if A. is tenant for life of a copyhold, remainder to B. in fee, and the lord grant the freehold to A. and his heirs, upon A.'s death the freehold shall descend to his heir, and B. shall be entitled under the custom. But, if the grant had been to A. for his life, remainder to B. in fee, (following the limitations of the copyhold), then on A.'s death B. might either have assented to the limitation to him, and so have completed the enfranchisement, or he might have disclaimed the estate and resorted to his copyhold. So, if A. had been tenant in tail special by the custom, and the grant of the freehold had been to him and his heirs general, here, if the custom allowed of a bar by surrender merely, it might well be contended that the enfranchisement was equivalent to a surrender for that purpose; and since the stat. 3 & 4 Will. 4, c. 74, a surrender is sufficient to bar a legal entail in copyholds notwithstanding any custom. But before that act, where the custom allowed of a bar only by recovery in the lord's court, it was said that the enfranchisement was necessarily a bar of the entail, because otherwise there would be a perpetuity, as no customary recovery could be suffered after the severance. *Dunn* v. *Green*, 3 P. Wms. 9; *Parker* v. *Turner*, 1 Vern. 393, 458; 2 Ch. Ca. 174, (in which case, however, the claim was by the issue, who appear to have been excluded by a fine levied at common law after the enfranchisement.]

M. Podger's case.

Enfranchisement to tenant for life held not to destroy the copyhold remainders.

[The above deductions from principle are supported by the resolutions in *M. Podger's case*, 9 Rep. 104, where a copyhold was demisable for lives, to go to the persons named in succession, and having been granted in that manner to John Podger and Eliz. and Mary, his daughters, for their lives; and John being in possession took from the lord a bargain and sale of the freehold to him and his heirs, and afterwards the lord levied a fine with proclamations to the use of John, and after John's death his heir levied a fine. It was held, that copyholds were within the Statute of Fines; but that the bargain and sale and fine to John did not divest the estates in remainder of his daughters, so that they might enter after his death. And it was resolved (though not necessary for the determination of the case) that after the bargain and sale Eliz. could not enter during the life of J., for her estate was to commence in possession after his death, by the custom. And so, if a copyholder for life, where the remainder is for life, commit a forfeiture, he in the remainder shall not enter, but the lord and he shall retain it during the life of him that committed the forfeiture; but that shall not destroy the remainder without an express custom in such case. See *Doe* d. *Beadon* v. *Pyke*, 5 Mau. & S. 154.]

Bernard v. *Simpson.*

Entail not barred by enfranchisement.

[Again in *Bernard* v. *Simpson*, Clayt. 138, a copyholder in tail having procured an enfranchisement, it was thought that his heir might nevertheless plead riens per discent; but the defendant being proved to have other freeholds by descent, the point was not decided. In *Taylor* v. *Shaw*, Carth. 622, a tenant in tail of a copyhold was held to have barred his issue by the combined effect of an enfranchisement and a fine, but not by the enfranchisement simply.]

Wynne v. *Cookes.*

[In *Wynne* v. *Cookes*, 1 B. C. C. 515, A. devised freeholds and copy-

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holds to B. for life, with remainder to C. in tail, with remainder over. B. took an enfranchisement of the copyholds to himself in fee; after his death C. suffered a recovery of all the estates devised by A. It was held by Eyre, B., that this recovery did not bar the entail in the copyhold, and he decreed, that, on repayment of the consideration for the enfranchisement, B.'s devisee should convey the estate to the uses of A.'s will. It seems, therefore, to have been assumed, that the copyhold remainders were destroyed, and were not replaced by estates at common law. The first member of this conclusion, however, is directly contradicted by the resolution in *M. Podger's case*, supra.]

Enfranchisement to tenant for life held, in equity, to be for the benefit of those in remainder.

[In *Challoner* v. *Marshall*, 2 Ves. jun. 524, copyholds were settled to the use of A. for life, remainder to his eldest son B. in tail. The lord conveyed the fee-simple to A., who died intestate as to that estate. By the custom entails were barrable by surrender. It was held, that the entail was extinct. Lord Loughborough said, "It is impossible that any equity could keep alive this entail. No one could have a right against the tenant in tail. The case by Lord Jefferies proves a plain proposition—that where the interest of the lord in the manor is united with the copyhold in tail, there must be a merger, for the method of barring it cannot exist." In his Lordship's opinion, therefore, it was the descent of the freehold on the tenant in tail, and not the act of the tenant for life, that barred the entail. Sir R. P. Arden, M. R., speaking of this case, said, (3 Ves. 128), "The point there is that the enfranchisement barred the remainders over, because, if not barred that way, they could not be barred by any other. He could not bar them by surrender, for he had no copyhold to surrender. He could not bar them at all; therefore the opinion of the Lord Chancellor was, that, from that moment, he became tenant in fee."]

Challoner v. *Marshall.* Entail held to be barred by enfranchisement.

[In *Roe* d. *Clemmett* v. *Briggs*, 16 East, a burgage tenement, held of a manor in which there did not appear to be any custom of entailing, was devised to the testator's wife during widowhood, remainder to R. C. his youngest son for life, remainder to the heirs of the body of R. C. living at his death, as tenants in common, and in case he should die without issue, remainder over. It was held, that R. C. took either a conditional fee, or an estate for life with a contingent remainder to his child or children living at his death; and also, R. C. and the testator's heir having, after the birth of a son, by a customary assurance, conveyed all his estate to T. and his heirs, and one claiming under T. having, in the lifetime of R. C., taken an enfranchisement by feoffment, that the claim of the son of R. C. was defeated. Lord Ellenborough, after observing that a contingent copyhold remainder was preserved from destruction by the common-law estate in the lord, (4 T. R. 64), said, that the outstanding legal estate in the lord having become united with the particular estate the protection was lost*. "By the enfranchisement the estate became

Roe d. *Clemmett* v. *Briggs.* Contingent remainders held destroyed by enfranchisement to the tenant for life.

* [Hence the common, or rather universal, practice of dispensing with limitations to trustees to preserve contingent remainders, in settlements of copyholds, seems to be erroneous, for the doctrine in *Wynne* v. *Cookes* supra, (assuming that case to be well founded), may not be extended to make the tenant for life a trustee for *contingent* remaindermen; and according to *M. Podger's case*, a *vested* remainder in trustees cannot be destroyed by enfranchisement to the tenant for life.]

Propriety of inserting limitations to trustees to preserve, in settlements of copyholds.

88. ENFRANCHISEMENT OF COPYHOLDS.

severed from the manor; and though the person to whom the enfranchisement is made has only a particular estate in the premises, and he takes a conveyance of the freehold in fee, it shall be an absolute enfranchisement, the copyhold tenure shall be extinct for ever, and *the enfranchisement shall enure for the benefit of those in remainder, that is, their estate shall cease to be held of the manor, and shall become of freehold tenure.* After the enfranchisement, the premises being severed from the manor, and the tenure changed, all customs, and all rights and privileges which before attached to their customary tenure, ceased with respect to them." Mr. Preston has a query, whether the case was rightly decided. 3 Conv. 541, n. See *Lovell* v. *Lovell*, 3 Atk. 12; *Stanfield* v. *Habergham*, 10 Ves. 282.]

Doe d. *Newby* v. *Jackson*.

[In *Doe* d. *Newby* v. *Jackson*, 1 B. & Cr. 448; 2 D. & Ry. 514, a feme copyholder in fee, after admittance, married, and her husband purchased the freehold of the lord, and took a conveyance to himself and his heirs by deed of feoffment and livery, in which deed the title of the wife was recited. The husband died, and afterwards the widow, leaving two sons of the marriage, the eldest of whom acquired seisin, and died without issue. The Court leaned to the conclusion, that the estate descended to the heir ex parte maternâ. The reasons are given in D. & Ry. at some length, but it is difficult to believe that the judges uttered the nonsense there attributed to them. The case is utterly valueless as an authority.]

Wilson v. *Allen*.

Enfranchisement to cestui que trust of the freehold good in equity.

[Lastly, in *Wilson* v. *Allen*, 1 Jac. & W. 611, a suit for specific performance, the enfranchisement was taken by a cestui que trust, who had been admitted, but in whose favour it did not appear that the trustee had made any surrender. Sir T. Plumer, M. R., thought there was strong ground for presuming a surrender, but added, that, as the beneficial owner had accepted the enfranchisement, his trustee could not object, and if necessary his heir must join; so that it was a question of conveyance, and not of title. "I do not go," his Honor added, "on the ground very ingeniously suggested, that, as a cestui que trust is considered in law as tenant at will, he may be competent to take from the lord a grant of his whole interest in fee, and that it will operate as an enfranchisement in the same way as it has been decided that a tenant for life may, and that it will enure for the benefit of the remainderman, the person on whom the freehold descends being bound to convey to them. It is a new question, which I need not take upon myself to decide."]

Remark on the cases.

[These appear to be all the authorities upon this question. They are anything but consistent with each other, and can hardly be treated as having settled an yone point as to the effect of an enfranchisement to a particular tenant. The Real Property Commissioners lay down the rule without any qualification, that to a complete enfranchisement a fee-simple in the tenant, as well as in the lord, is necessary. (Third Rep. 17). And this is, no doubt, the correct conclusion in principle.]

Stat. 4 & 5 Vict. c. 35.

[Extensive provisions for enfranchisement, both of particular copyholds, and of all copyholds of a manor, under the superintendence of a board of "Copyhold Commissioners," are contained in the statute 4 & 5 Vict. c. 35, amended by 6 & 7 Vict. c. 23, to which the reader is referred; want of space preventing their insertion here.]

89. COPYHOLDS FOR LIVES, AND LEASEHOLDS FOR RESIDUE OF A LONG TERM.

89. COVENANT *to surrender* COPYHOLDS *for* LIVES (*a*), *and* ASSIGNMENT *of a* LEASEHOLD *Estate, held for* 10,000 *Years, at a nominal Rent.*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of ——, of the one part; and [*purchaser*], of——, of the other part.

Recital of grant of copyholds for lives;

WHEREAS, at a general customary court, held on the —— day of ——, in and for the manor of ——, in the county of ——, the lord of the said manor, by his steward, granted seisin, according to the custom of the said manor, unto the said [*vendor*], of *All that* (*parcels*), with the appurtenances, *To hold* the same unto the said [*vendor*], his heirs and assigns, for the term of the natural lives of [*cestuis que vie*], and of the life of the survivor of them, at the will of the lord, according to the custom of the said manor, at the rents and services therefore due and of right accustomed.

—of lease;

AND WHEREAS, by indenture of lease, bearing date on or about the —— day of ——, in the year 1684, and expressed to be made between [*lessor*], of ——, of the one part; and [*lessee*], of ——, of the other part; for the considerations therein mentioned, the said [*lessor*] did grant and demise unto the said [*lessee*], his executors, administrators, and assigns, *All those* (*parcels*), *To hold* the same unto the said [*lessee*], his executors, administrators, and assigns, from the day of the date thereof, for the term of ten thousand years, without impeachment of waste, at the yearly rent of one wheat corn on the feast-day of the blessed Virgin Mary yearly, (if demanded).

AND WHEREAS, by virtue of divers mesne assignments, assurances, and other acts in the law, and particularly by indenture bearing date on or about the —— day of ——, and made between [*assignor*], of the one part, and the said [*vendor*], of the other part, the said hereditaments comprised in the said indenture of lease, together with two messuages or tenements, and other buildings then lately erected and built thereon, were duly assigned to and became vested in the said [*vendor*], for the residue of the said term of ten thousand years.

—of contract for sale.

AND WHEREAS the said

(*a*) As to copyholds held pur auter vie, vide ante, Vol. 2, p. 201.

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[*vendor*] hath contracted with the said [*purchaser*] for the absolute sale to him of the said copyhold or customary hereditaments hereinbefore described, for the respective lives of the said [*cestuis que vie*], and also of the said leasehold hereditaments, for the residue of the said term of ten thousand years therein, at and for the price or sum of £——; which purchase-money hath been apportioned in the manner following, (that is to say), the sum of £——, part thereof, has been deemed to be the price of the said copyhold hereditaments, and the sum of £——, the residue thereof, has been deemed to be the price of the said leasehold hereditaments, (*vide ante, p.* 537). NOW THIS INDENTURE WITNESSETH, that, in consideration of the said sum of £——, of lawful British money, paid by the said [*purchaser*] to the said [*vendor*], at the time of the sealing and delivery of these presents, being part of the said entire purchase-money as aforesaid, the receipt of which sum of £—— the said [*vendor*], doth hereby acknowledge, and from the same doth for ever discharge the said [*purchaser*], his heirs, executors, administrators, and assigns; He the said [*vendor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his heirs and assigns, that he the said [*vendor*] or his heirs will or shall, as soon as conveniently may be, on the request and at the costs of the said [*purchaser*], his heirs or assigns, surrender into the hands of the lord of the said manor, according to the custom thereof, all and singular the copyhold or customary hereditaments hereinbefore described, parcel of the said manor, and granted to the said [*vendor*] for the natural lives of the said [*cestuis que vie*], and the life of the survivor of them, as hereinbefore recited; To THE USE of the said [*purchaser*], his heirs and assigns, to the intent that the lord of the said manor may regrant the same copyhold or customary hereditaments to the said [*purchaser*], his heirs and assigns, for the natural lives of the said [*cestuis que vie*], and the life of the survivor of them; And that, thereupon, the said [*purchaser*] may be duly admitted tenant of the said copyhold premises, *To hold* the same at the will of the lord, according to the custom of the said manor, subject to the rents and services therefore due and of right accustomed. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the sum of £——, of lawful money aforesaid, paid by the said [*purchaser*] to the said [*vendor*] at or immediately before

Testatum.

In consideration of an apportioned share of purchase-money, vendor covenants to surrender copyholds.

Further testatum.

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the sealing and delivery of these presents, (being the residue of the said sum of £——, the entire purchase-money for the said copyhold and leasehold hereditaments as aforesaid), the receipt of which sum of £—— the said [*vendor*] doth hereby acknowledge, and from the same doth for ever discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, He the said [*vendor*] *Doth,* by these presents, bargain, sell, assign, and transfer unto the said [*purchaser*], his executors, administrators, and assigns, ALL AND SINGULAR the said two several parcels of land and other hereditaments comprised in the hereinbefore-recited indenture of lease, and which were thereby demised to the said [*lessee*] for the term of ten thousand years as aforesaid; *And also* all those two messuages or tenements, and all other the buildings since erected and built, and now standing and being on the same parcels of land, or any part thereof, Together with their and every of their rights, members, and appurtenances; And all the estate, &c. TO HAVE AND TO HOLD the said parcels of land, messuages, or tenements, and all and singular other the hereditaments hereinbefore expressed to be hereby assigned, unto the said [*purchaser*], his executors, administrators, and assigns, from henceforth during all the residue and remainder now to come and unexpired of the said term of ten thousand years, granted by the said indenture of lease, and for all other the estate, term, and interest (if any) of the said [*vendor*] therein. AND the said [*vendor*] doth hereby, for himself, his heirs, executors, and administrators, further covenant and agree with the said [*purchaser*], his heirs, executors, administrators, and assigns, in manner following, (that is to say), that, notwithstanding any act, matter, or thing whatsoever, by him the said [*vendor*] at any time heretofore done, committed, or suffered to the contrary, he the said [*vendor*] now stands lawfully and absolutely seised of the said copyhold or customary hereditaments and premises, for an estate during the lives of the said [*cestuis que vie*], and the life of the survivor of them, at the will of the lord, according to the custom of the said manor of ——, without any condition, reservation, or any other matter or thing, to defeat, make void, determine, or encumber the same; *And also,* that, notwithstanding any such act, matter, or thing to the contrary as aforesaid, the hereinbefore-recited indenture of lease is a good and sufficient lease, valid in the law to all intents and purposes, and not forfeited, surrendered, charged, or encum-

In consideration of residue of purchase-money, vendor assigns to purchaser leaseholds.

Habendum.

Covenants by vendor,

—that he is seised of copyholds;

—that lease is valid;

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bered in anywise howsoever; *And also*, that, notwithstanding any such act, matter, or thing to the contrary as aforesaid, he the said [*vendor*] now hath in himself full power and absolute authority to surrender the said copyhold or customary hereditaments and premises, and to assign the said leasehold hereditaments and premises to the use of and unto the said [*purchaser*], his heirs, executors, administrators, and assigns respectively, in the manner aforesaid, and according to the true intent and meaning of these presents; *And further*, that it shall be lawful for the said [*purchaser*], his heirs, executors, administrators, and assigns respectively, from time to time and at all times hereafter, peaceably and quietly to enter into and upon, hold, and enjoy, all and singular the said copyhold and leasehold hereditaments and premises respectively, during the lives of the said [*cestuis que vie*], and the life of the survivor of them, according to the custom of the said manor of ——, with respect to the said copyhold premises, and during the residue now unexpired of the said term of ten thousand years, granted by the hereinbefore-recited indenture of lease, with respect to the said leasehold hereditaments and premises; and to receive and take the rents and profits of all and singular the said copyhold and leasehold hereditaments and premises respectively, without any interruption or disturbance whatsoever by the said [*vendor*], his heirs, executors, or administrators, or any person or persons lawfully claiming from, by, under, or in trust for him or them; *And that* free and clear, and freely and clearly exonerated and discharged, or otherwise by him the said [*vendor*], his heirs, executors, or administrators, effectually kept indemnified of, from, and against all and all manner of former and other gifts, grants, estates, titles, charges, and incumbrances whatsoever, made, done, occasioned, or suffered by the said [*vendor*], or by any person or persons lawfully claiming from, by, under, or in trust for him or them, or by or through his acts, default, privity, or procurement; *And lastly*, that he the said [*vendor*], his heirs, executors, and administrators, and every other person lawfully claiming from, by, under, or in trust for him or them, will and shall from time to time and at all times hereafter, upon every reasonable request, and at the costs of the said [*purchaser*], his heirs, executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and executed, All such further acts, deeds, conveyances, and assurances in the law whatsoever, for the

—that he hath right to surrender and assign;

—for peaceable enjoyment,

free from incumbrances;

—and for further assurance.

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more effectually surrendering, conveying, and assuring the same copyhold or customary hereditaments and premises to the use of the said [*purchaser*], his heirs and assigns, according to the custom of the said manor of ——, during the residue which shall be then unexpired of the lives of the said [*cestuis que vie*], or the life of the survivor, and for the more effectually assigning and assuring all and singular the said leasehold hereditaments and premises unto the said [*purchaser*], his executors, administrators, and assigns, during all the residue which shall be then unexpired of the said term of ten thousand years therein, as by the said [*purchaser*], his heirs, executors, administrators, or assigns respectively, or his or their counsel learned in the law, shall be devised, or advised and required (*b*). IN WITNESS &c.

(*b*) The rent of the leaseholds being merely nominal, and the lease not containing any covenants on the part of the lessee, the usual covenant by the purchaser for the payment and performance of the rent and covenants of the lease is not inserted.

90. LEASEHOLDS BY MORTGAGEE FOR SALE.

90. ASSIGNMENT *of Leaseholds by a* BANKING FIRM *as Mortgagees* EMPOWERED *to* SELL, *and in which a* TRUSTEE *of the* LEGAL ESTATE JOINS.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendors*], of &c., bankers, of the first part; [*trustee*], of &c., of the second part; and [*purchaser*], of &c., of the third part. WHEREAS (*recite lease*). AND WHEREAS, by virtue of divers mesne assignments, or other sufficient assurances in the law, and particularly by an indenture of assignment, bearing date on or about the —— day of ——, and expressed to be made (*a*) between [*assignors*], (therein de-

Recital of original lease.

Notice of assignments.

As to the words "expressed to be made."

(*a*) The words "expressed to be made" are obviously designed to provide against the possible event of the recited deed not being executed by all the persons whose names are introduced as parties to it; and in such case their insertion seems to be necessary to complete accuracy, since a deed cannot correctly be described to be "made" by a person who does not execute it. They would, of course, be particularly appropriate, when any of the professed parties to the deed refuse to execute it; as, where a trustee disclaims an estate intended to be conveyed to

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scribed), of the first part; [*mortgagor*], (therein described), of the second part; and the said [*trustee*], of the third part; the said hereditaments, comprised in and demised by the said indenture of lease, were assigned to, or became legally vested in, the said [*trustee*], for all the residue of the said term of —— years, by the said indenture of lease granted, and subject to the rents thereby reserved, and the covenants therein contained, *In trust* for the said [*mortgagor*], his executors, administrators, and assigns, and to be assigned and disposed of as he or they should direct. AND WHEREAS, by an indenture bearing date on or about the —— day of ——, and made between the said [*mortgagor*], of the one part, and the said [*vendors*], of the other part, the said [*mortgagor*] did assign unto the said [*vendors*], their executors, administrators, and assigns, (amongst other things), the said hereditaments comprised in the said indenture, *To hold* the same unto the said [*vendors*], their executors, administrators, and assigns, during the residue of the said term of —— years, *Upon trust*, at such time or times, and in such manner, as they, or the survivors or survivor of them, or the executors or administrators of such survivor, or their or his assigns, in their or his discretion might think fit, absolutely to sell and dispose of the said leasehold hereditaments, either together or in lots, and either by public auction or private contract, to any person or persons who should be willing to become the purchaser or purchasers of the same, or any of them, or any part thereof respectively, for the best price or prices that could be reasonably had or gotten for the same; and, for the purpose of effecting such sale or sales, to enter into, make, and execute all such contracts, agreements, acts, deeds, assignments, and assurances as they or he should think proper. And it was, by the indenture now being recited, agreed and declared, that all such contracts, agreements, acts, deeds, assignments, and assurances, as should or might be entered into, made, and executed by the said [*vendors*], or the

Recital of the assignment to the vendors, in trust for sale;

—declaration of trusts for sale;

—sale to be with or without the concurrence of the assignor;

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him. The deed of disclaimer reciting the trust deed should state it as a deed *expressed* to be made between the intended grantors and the trustee, who refuses the acceptance of the estate intended to be vested in him. This explanation rescues the term from the imputation of absurdity cast upon it by a learned writer, who considers it as implying the possibility of a deed being made by other persons than those named in it, which he truly states to be an implication unfounded in law. Coventry's Concise Convey. 45.

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survivors or survivor of them, or the executors or administrators of such survivor, or their or his assigns, should or might be entered into, made, and executed, either with or without the concurrence of the said [*mortgagor*], his executors, administrators, or assigns, and whether he or they should join therein or assent thereto, and should be, to all intents and purposes whatsoever, valid and effectual, and bind the said [*mortgagor*], his executors, administrators, and assigns; and that the receipt or receipts of the said [*vendors*], or the survivors or survivor of them, or the executors or administrators of such survivor, or their or his assigns, for any money to arise by the said sale or sales, or otherwise, by virtue of the indenture now in recital, should effectually discharge the person or persons to whom the same should be given from being answerable or accountable for the misapplication or non-application, or from being in anywise bound or concerned to see to the application of the money therein respectively mentioned to be received, or from being bound and concerned to inquire into the necessity or propriety of any sale or sales which might be made by virtue of the indenture now in recital. And it was declared, that the said [*vendors*], their executors, administrators, and assigns, should stand possessed of and interested in all and singular the monies to arise from the sale or sales of the said leasehold hereditaments, and of and in the rents and profits thereof, until the same should be sold, *Upon trust* (*to pay expenses attending the execution of the trust, and pay themselves principal and interest monies, and to pay over the surplus to the mortgagee, his executors, administrators, or assigns, in the usual manner*). And whereas the said [*mortgagor*] hath since departed this life, and there is now justly due and owing to the said [*vendors*] from his estate, for principal and interest upon or by virtue of the hereinbefore-recited security, the sum of £——, or thereabouts, as they the said [*vendors*] do hereby respectively testify and declare. And whereas, by virtue of the trust, power, or authority for this purpose given to or vested in them the said [*vendors*], in and by the lastly-hereinbefore-recited indenture, They the said [*vendors*] caused the said leasehold hereditaments comprised in the said indenture of lease, and intended to be hereby assigned, to be put up to sale by public auction in one lot, at the auction mart in the city of London, on the —— day of —— last; and the said [*purchaser*], being the highest bidder at such auction, was duly declared and became the purchaser thereof, at or for

—vendor's receipt to be a good discharge;

—purchasers not to be accountable for misapplication of the purchase-money;

—trusts of the proceeds of sale.

Recital of the death of mortgagor, and that a sum was due to mortgagees

—that, under the trusts of the above indenture, vendors caused the premises to be put up to sale by auction;

—sale to purchaser;

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the price or sum of 2000*l.* AND WHEREAS the said [*trustee*], at the request of the said [*vendors*], hath agreed to make and execute, or join in the assignment of the said premises to the said [*purchaser*], in the manner hereinafter mentioned and expressed. NOW THEREFORE THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 2000*l.* sterling to the said [*vendors*], as the trustees for the purposes of the said indenture of the —— day of ——, at or before the sealing and delivery of these presents, paid by the said [*purchaser*], the receipt of which sum they the said [*vendors*] hereby respectively acknowledge, and from the same *Do*, and each of them *Doth*, acquit and for ever discharge the said [*purchaser*], his heirs, executors, and administrators, by these presents; *And also* in consideration of the sum of 10*s.*, to the said [*trustee*] at the same time paid by the said [*purchaser*], the receipt whereof is hereby also acknowledged, he the said [*trustee*], at the request and by the direction of the said [*vendors*], (testified by their severally executing these presents), *Doth*, by these presents, bargain, sell, assign, and transfer, And the said [*vendors*], by virtue and in exercise of the trust, power, or authority to them for this purpose given or reserved by the said indenture of the —— day of ——, and of every or any other trust, power, or authority whatsoever in anywise enabling them in this behalf, *Do*, and every of them *Doth*, by these presents, bargain, sell, assign, ratify, and confirm, unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT the aforesaid ——, and all and singular other the hereditaments and premises whatsoever (if any) comprised and demised by the said indenture of lease, or mentioned or intended so to be, with their and every of their rights, members, and appurtenances. *And also* all the estate, right, title, interest, term of years yet to come and unexpired, benefit, advantage, claim, and demand whatsoever, both at law and in equity, of them the said [*trustee*] and [*vendors*], and each and every of them, in, to, or out of the said hereditaments and premises, together with the said indenture of lease, and all mesne assignments thereof, and all benefit and advantage of the same respectively. TO HAVE AND TO HOLD the said hereditaments, and all and singular other the premises hereby bargained, sold, assigned, and confirmed, or intended so to be, unto the said [*purchaser*], his executors, administrators, and assigns, from henceforth, during

—that trustee had agreed to join.

Testatum.

In consideration of purchase-money paid to vendors, and for nominal consideration to trustee,

trustee, by the direction of vendors, assigns, and vendors confirm.

Parcels.

All the estate, &c.

Habendum to purchaser for the residue of term.

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all the residue and remainder now unexpired of the said term of —— years, granted by the said indenture of lease as aforesaid; But subject nevertheless to the rents, covenants, and agreements, by and in the said indenture of lease reserved and contained, and on the tenant's or lessee's part to be paid, observed, and performed. (*Covenant by trustee that he has not encumbered, ut ante, p.* 106). And each of them the said [*vendors*], for himself, his heirs, executors, and administrators, and so far as relates to or concerns his own respective acts and deeds or defaults only, doth covenant and agree with the said [*purchaser*], his executors, administrators, and assigns, by these presents, in manner following, (that is to say), that they the said [*vendors*] have not, nor have or hath any or one of them, at any time heretofore, made, done, executed, or permitted any act, deed, matter, or thing whatsoever, by means whereof the said hereditaments and premises intended to be hereby assigned, or any part thereof, are or is impeached, assigned, charged, or encumbered in anywise howsoever; *And likewise* (*b*), that they the said [*vendors*], or their respective executors and administrators, and every other person lawfully claiming any estate, right, title, or interest in or to the said hereditaments and premises, or any part thereof, by, from, through, under, or in trust for them or any of them, will and shall, from time to time and at all times hereafter during the residue of the said term hereby assigned, at the request, costs, and charges of the said [*purchaser*], his executors, administrators, or assigns, make and execute, or cause to be made and executed, all such further acts, deeds, assignments, and assurances in the law whatsoever, for the more effectually assigning, assuring, and confirming the said hereditaments and premises unto the said [*purchaser*], his executors, administrators, and assigns, for all the residue which shall be then unexpired of the said term of —— years, as by the said [*purchaser*], his executors, administrators, and assigns, or his, their, or any of their counsel shall be reasonably devised, or advised and required. (*If so intended, insert covenant by purchaser to pay*

Covenant by trustee that he has not encumbered.

Several covenant from the three trustees for sale that they have not encumbered,

and for further assurance.

As to the covenant for further assurance.

(*b*) Though trustees generally object to enter into a covenant for further assurance, yet in such a case as the present, where the purchase-money goes into their hands, and in a qualified sense for their own benefit, it seems not unreasonable to require such a covenant from them. Vide ante, p. 397.

rent and perform covenants of lease, ut ante, p. 572 (*c*)). IN WITNESS &c.

90. LEASEHOLDS BY MORTGAGEE FOR SALE.

(*c*) In the draft from which this precedent was taken the purchaser entered into a covenant with the vendors to pay the rent and perform the covenants of the lease, and indemnify them therefrom; but the Editor has omitted the covenant, because there seems to be considerable doubt, whether, where the vendors of leaseholds, being trustees for sale, are not themselves liable to the rents and covenants, except as assignees, *i. e.* for breaches during their ownership, a purchaser can be required, without a special stipulation, to enter into such a covenant. The better opinion is, that he cannot, for the reasons stated ante, pp. 172, 449. An exemption of this kind may be considered as in the nature of a set-off against the disadvantage which a person dealing with a trustee-vendor is under in having no covenants for title. If the person who is interested in requiring an indemnity covenant voluntarily enters into covenants for title, which not unfrequently happens, it seems fair that a covenant of indemnity should be stipulated for on his behalf.

As to the indemnity covenant.

91. CONVEYANCE *in Fee to a* PURCHASER *by* TRUSTEES, *under an* ACT *of* PARLIAMENT, *for effecting a Sale of certain settled Estates* (*a*), *which were inconveniently detached from the Bulk of the Family Property.*

91. UNDER POWER IN ACT OF PARLIAMENT.

THIS INDENTURE, made the —— day of ——, BETWEEN [*trustees for sale*], of &c., of the first part; [*tenant*

Parties.

(*a*) In preparing conveyances by trustees for sale who derive their authority from an act of Parliament, care should be taken to adhere as closely as possible to the terms of the act, the provisions of which usually describe the manner of executing the trust, in some particulars at least, with so much explicitness, that the recitals of the deed are little more than an echo of the act. The enactment which vests the property in the vendors, and prescribes the mode of the sale, and of the payment of the purchase-money, it is usual and proper to state at length; though the verbosity of such acts sometimes leads to a departure from this plan, especially in small purchases, and then the substance only of the enacting clause is stated. The recitals of the act, which explain its object, are frequently stated; but this is only necessary where, as in the present instance, they are explanatory of something to be done in regard to the purchase, as it is enough for the purchaser that the Legislature has thought fit to render the estate saleable, without entering into the reasons for its doing so. Here, the circumstances as to the redemp-

Remarks upon the precedent.

91. UNDER POWER IN ACT OF PARLIAMENT.

for life], of &c., of the second part; [*purchaser*], of &c., of the third part; and [*trustee to prevent dower*], of &c., of the fourth part. WHEREAS, (*recite will of late owner, whereby he devised his lands in the several parishes of —— and ——, in the county of York, and in the parish of ——, in the county of Lincoln, and elsewhere, to the party of the second part, during his life, with remainder to trustees to preserve contingent remainders; with remainders to his first and other sons successively, in tail male; with remainders to his daughters in tail general; with remainders to the second tenant for life and his issue, in like manner; also, the death of the testator, and probate of his will*).

Recital of will.

—of the act of Parliament;

AND WHEREAS, by an act of Parliament passed in the —— year of King George the Fourth, intituled "An Act for vesting certain detached settled estates, late of [*testator*], deceased, in trustees, to sell the same, and to lay out the monies thence arising in the purchase of other estates, to be settled to the same uses;" *after reciting*, among other things, the said will of the said [*testator*], deceased;

—which recited that tenant for life was in possession;

And also reciting, that the said [*tenant for life*] was in the possession and receipt of the rents and profits of the said messuages, farms, lands, and hereditaments in the parishes of —— and ——, in the county of York and in the county of Lincoln, as the first tenant for life thereof, under the limitations thereof in the said will contained;

—his marriage;

And also reciting, that the said [*tenant for life*], in or about the month of ——, intermarried with [*wife*], daughter of [D. M.], late of &c., deceased, who was then living, and by whom he had issue then living two sons and one daughter, *viz.* [L., S., and G.], all of whom were infants under the age of twenty-one years; *And also reciting*, that the said [*second tenant for life*], in or about the month of ——, intermarried with [*wife*], but had then no issue; *And also reciting*, that the said [*tenant for life*], some time since, under the powers of certain acts of Parliament made and then in force, for the redemption and sale of the land-tax (*b*), purchased the land-tax then charged

—that tenant

tion of the land-tax rendered it necessary, or rather convenient, to state the recitals in the act. Sometimes, where lands are made saleable by act of Parliament, the sale is to be made under the direction of the Court of Chancery; in which case, the recitals of the deed in some respects correspond with those of the precedent in the text, and in others, with the form of the conveyance where the sale is made in pursuance of a decree, vide ante, p. 468.

(*b*) Vide the Land-Tax Redemption Act, 42 Geo. 3, c. 116, s. 10.

91. UNDER POWER IN ACT OF PARLIAMENT.

upon all the messuages, farms, lands, tenements, and hereditaments, of which he was tenant for life as aforesaid, amounting to the yearly sum of £——, the consideration for which purchase was the sum of £——, Three Pounds per Centum Reduced Annuities, and £——, Three Pounds per Centum Consolidated Annuities, transferred by him the said [*tenant for life*] to the Commissioners for liquidating the National Debt, pursuant to the directions of the said acts of Parliament in that behalf; *And also reciting*, that the most considerable part of the family property of the said [*tenant for life*] and [*second tenant for life*] was situate in the counties of Gloucester and Somerset, and it would be convenient that the whole of their estates, instead of being unconnected and dispersed, as they then were, should lie as near as might be together, or in the same vicinity; *And also reciting*, that the aforesaid messuages, farms, lands, tenements, and hereditaments, situate respectively in the parishes of —— and —— in the county of York, and of —— in the county of Lincoln, respectively, devised by the said will, and of which the said [*tenant for life*] was first tenant for life as aforesaid, were situated at great distances from each other, and the whole of the same were far distant from the said counties of Gloucester and Somerset, by reason whereof it would be greatly for the convenience, as well of the said [*tenant for life*] and his issue, as of the said [*second tenant for life*], and his issue, (if he should thereafter have any issue), that the said estates should be sold, and that the money to arise from and be produced by such sale should be applied, in the first place, in paying and discharging all expenses attending such sale or sales, and, in the next place, in replacing to the said [*tenant for life*] the said two sums of £——, Three Pounds per Centum Reduced Annuities, and £——, Three Pounds per Centum Consolidated Annuities, so transferred by him for the purchase of the land-tax then lately charged upon the same estates, and that the residue of such money should be laid out in the purchase of other estates and hereditaments in the said county of Somerset, or in the adjoining counties of Gloucester and Devon, or in some or one of them, to be settled to the uses declared by the will of the said [*testator*], deceased, of and concerning the said hereditaments so to be sold as aforesaid, or such and so many of those uses as might be subsisting and capable of taking effect; *And also reciting*, that, by reason of the infancy of the children of the

for life had redeemed the land-tax;

—that the family property of the tenant for life was situate at a great distance from the devised estates;

—that it would be convenient that the devised estates should be sold;

91. UNDER POWER IN ACT OF PARLIAMENT.

said [*tenant for life*], then born, and the limitations in the said recited will to the sons and daughters of the said [*tenant for life*], and to the sons and daughters of the said [*second tenant for life*] respectively, in the manner therein and hereinbefore mentioned, the purposes aforesaid could not be effected without the aid of Parliament: *It was thereby enacted*, that, from and immediately after the passing of the said act, all those the said messuages, lands, and hereditaments, situate, lying, and being in the parishes of —— and ——, in the said county of York, and in the parish of —— in the county of Lincoln, (which included the messuage, lands, and hereditaments hereinafter described, and intended to be hereby granted and released), or in some adjacent or adjoining parishes, comprised in the said will of the said [*testator*], deceased, and by him thereby devised to the said [*tenant for life*], and more particularly mentioned and described in the schedule to the now-being-recited act annexed, with their and every of their rights, members, and appurtenances, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, should be vested in and settled upon, and the same were thereby absolutely vested in and settled upon, the said [*trustees for sale*], their heirs and assigns, *To the use* of the said [*trustees for sale*], their heirs and assigns, for ever, freed and absolutely acquitted, exonerated, and discharged of and from all and singular the uses, estates, devises, limitations, trusts, entails, remainders, reversions, powers, provisoes, declarations, charges, and incumbrances whatsoever in and by the said will of the said [*testator*], deceased, limited, expressed, declared, or contained of or concerning the same respectively, or any part or parts thereof, (save and except any legal lease or leases, or legal agreement for any lease or leases, which had been granted or entered into for the same premises, or any part thereof); but nevertheless, *In trust* that they the said [*trustees for sale*], and the survivor of them, and the heirs and assigns of such survivor, did and should, as soon as conveniently might be, with the consent in writing of the said [*tenant for life*], during his life, make sale and dispose of the said messuages or tenements, and other hereditaments thereby vested and settled as aforesaid or any part or parts thereof, either together or in parcels, and either by public auction or private contract, unto any person or persons who should be willing to become the pur-

—it is then enacted that the devised estates in Yorkshire and Lincolnshire should be vested in the trustees for sale;

—free from the limitations in the will;

—in trust for sale;

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chaser or purchasers thereof, for the most money that could be reasonably had and gotten for the same; and upon payment into the Bank, in the manner thereinafter mentioned, of the purchase-money for which the said hereditaments, or any part or parts thereof, should be so sold, did and should convey, grant, and assure the same hereditaments so to be sold and disposed of as aforesaid, unto and to the use of the purchaser or purchasers thereof, his, her, or their heirs or assigns, or as he, she, or they should direct or appoint, freed and discharged as thereinbefore was mentioned; *And it was further enacted*, that so much of the said several sums of money to arise from, or be paid as the consideration-money of, the sale of the said messuages or tenements, lands, and other hereditaments, as the said [*trustees for sale*], or the survivor of them, his heirs or assigns, should require, should be applied by the person or persons so purchasing the same in or towards the purchase of the several sums of £——, Reduced Three Pounds per Centum Bank Annuities, and £——, Three Pounds per Centum Consolidated Annuities, for the purpose of replacing the like sums transferred by the said [*tenant for life*] for the purchase of the land-tax as aforesaid; And that the receipt or receipts of the said [*tenant for life*], for the part or parts thereof which should be so replaced, should be a sufficient discharge and discharges to the person or persons replacing the same for the monies laid out in the purchase thereof respectively; *And it was further enacted*, that, all and every sum and sums of money to arise from any sale or sales, made in pursuance of the act now being recited, of the said messuages or tenements, and other hereditaments, thereby made saleable as aforesaid, or any part of the same which should not be applied in or towards the replacing of the said several sums of Bank Annuities, should be paid by any person or persons to whom such sales should be so made into the Bank of England, in the name and with the privity of the Accountant-General of the High Court of Chancery, to be placed to his account there—"Ex parte the purchasers of the estate late of the said [*testator*], deceased," pursuant to the method prescribed by the act of the twelfth year of the reign of King George the First, chapter the thirty-second, and the general orders of the said Court, and without fee or reward, according to the act of the twelfth year of the reign of King George the Second, chapter twenty-four; *And it was further enacted*, that the certificate and certificates of

—and to convey and assure the premises to purchasers, or as they should direct;

—purchase-money, how to be applied;

—(after replacing to the tenant for life, certain Bank Annuities), to be paid into the Bank of England;

—certificate of Accountant-General and

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receipt of cashier of Bank to discharge purchasers.

the said Accountant-General, together with the receipt of one of the cashiers of the Bank of England thereto annexed, and therewith filed in the Register-Office of the said Court of Chancery, of the payment into the Bank of England by the purchaser or purchasers of the hereditaments thereby authorized to be sold, or any of them, or any part thereof, of his, her, or their purchase-money, should, from time to time and at all times, be a good and sufficient release and discharge to such purchaser or purchasers, and his, her, and their heirs, executors, administrators, and assigns, for so much of the said purchase-money for which such certificate or certificates, or such receipt or receipts, should be so given; and, after filing such certificate or certificates and receipt or receipts, such purchaser or purchasers, and his, her, or their heirs, executors, administrators, and assigns, should be absolutely and for ever freed and discharged of and from the said purchase-money, and should not be answerable or accountable for any loss, misapplication, or non-application thereof, or of any part thereof.

Recital of sale, pursuant to the act of Parliament;

AND WHEREAS the hereditaments hereinafter described, and intended to be hereby released, (being part of the said estates and hereditaments by the said act directed to be sold by the said [*trustees for sale*], as aforesaid, and being lots 1 and 2, respectively, in the particulars of sale of the same estates), were, on the —— day of ——, by virtue and in pursuance of the said act, with the consent of the said [*tenant for life*], put up to sale by public auction; and at such auction the said [*purchaser*], as the best bidder for both the same lots, was declared the purchaser thereof, at or for the price or sum of £——.

—that Bank Annuities had been replaced;

AND WHEREAS the said sums of £——, Reduced Three Pounds per Centum Bank Annuities, and £——, Three Pounds per Centum Consolidated Annuities, respectively, transferred by the said [*tenant for life*] for the purchase of the land-tax as aforesaid, have been replaced by and out of the sum and sums of money arising from the sale of such of the said hereditaments as are situate in the county of York, and by the said act made saleable as aforesaid, which the said [*tenant for life*] doth hereby acknowledge and declare;

—payment of purchase-money into the Bank of England.

AND WHEREAS the said [*purchaser*] hath, at or immediately before the sealing and delivery of these presents, paid the sum of £——, of lawful British money, in full for such purchase as aforesaid, into the Bank of England, in the name and with the privity of the Accountant-General of the High Court of

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Chancery, to be placed there, "Ex parte the purchasers of the estate late of the said [*testator*], deceased," pursuant to the directions in the said act, and the method prescribed by the act of the twelfth year of the reign of King George the First, chapter thirty-two, and the general orders of the said Court, as appears by the receipt of one of the cashiers of the Bank of England, together with the certificate of the said Accountant-General, thereto annexed, and intended to be both forthwith filed of record in the Register-Office of the said Court of Chancery (*c*). NOW THIS INDENTURE WITNESSETH, that, in pursuance and by virtue of the trust, power, and authority vested in the said [*trustees for sale*] by the said act, and of all other powers enabling them so to do, and in consideration of the sum of £——, of lawful British money, by the said [*purchaser*] paid into the Bank of England in the name and with the privity of the Accountant-General of the High Court of Chancery, and placed there "Ex parte the purchasers of the estate late of the said [*testator*], deceased," as hereinbefore recited; the payment of which sum of £—— in manner aforesaid they the said [*trustees for sale*], and also the said [*tenant for life*], Do, and every of them Doth, hereby acknowledge, and therefrom acquit and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, for ever, by these presents; *And also*, in consideration of the sum of 10*s.* to each of them the said [*trustees for sale*] and [*tenant for life*], in hand paid by the said [*purchaser*], at or immediately before the execution of these presents, the receipt whereof is hereby acknowledged, They the said [*trustees for sale*], with the consent and approbation of the said [*tenant for life*], (testified by his executing these presents), *Do*, and each of them *Doth*, by these presents, made &c., (*ut ante*, *p.* 72), grant, bargain, sell, and release, and the said [*tenant for life*] *Doth*, by these presents, ratify and confirm, unto the said [*purchaser*] and his heirs, ALL (*parcels and general words*); And the reversion, &c.; And all the estate,

Testatum.

In consideration of purchase-money paid into the Bank of England,

trustees, with the consent of tenant for life, convey, and tenant for life confirms.

Parcels.

(*c*) Where the sale is by auction, a deposit is generally made at the time of the sale, which goes into the hands of the auctioneer or vendor's agent; but this, of course, will be invested pursuant to the direction of the act, before the execution of the conveyance, and then it is unnecessary to notice the temporary mode of payment. Sometimes, the auctioneer's charges are proposed to be taken out of the sum invested, but this a purchaser should not assent to.

As to deposit.

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Deeds.

Attested copies.

Habendum to purchasers.

Discharged from limitations of will.

Limitations to prevent dower.

Covenant that trustees have not encumbered.

Covenants by tenant for life,

&c.; And all deeds, evidences, and writings touching or concerning the said hereditaments and premises, or any part thereof, either exclusively or in common with other hereditaments of inferior value, in the custody or power of the said [*trustees for sale*] and [*tenant for life*], or any of them, or which they or any of them can or may obtain without suit at law or in equity; And true and attested copies of all such other deeds, evidences, and writings, in their or any of their custody, or within their or any of their control, as aforesaid, which concern the said hereditaments and premises jointly with other hereditaments of greater value; all such copies thereof as shall be now required to be made and delivered at the costs and charges of the said [*tenant for life*], but all future copies to be made and taken at the expense of the said [*purchaser*], his heirs or assigns. TO HAVE AND TO HOLD the said hereditaments and premises unto the said [*purchaser*], and his heirs, for ever, freed and absolutely acquitted, exonerated, and discharged, of and from all and singular the uses, estates, devises, limitations, trusts, entails, remainders, reversions, powers, provisoes, declarations, charges, and incumbrances whatsoever, in and by the said will of the said [*testator*], deceased, limited, expressed, declared, or contained of or concerning the same respectively, or any part or parts thereof, *To the uses*, upon the trusts, and for the intents and purposes hereinafter declared concerning the same, (that is to say), (*uses to prevent dower, ut ante, p.* 73). (*Covenant by trustees for sale that they have not encumbered*). AND the said [*tenant for life*], for himself, his heirs, executors, and administrators, doth covenant and agree with the said [*purchaser*] and his heirs, by these presents, in manner following, (that is to say), that, notwithstanding any act, deed, matter, or thing whatsoever, made, done, executed, or suffered by him the said [*tenant for life*], or by the said [*trustees for sale* (*d*)], or the said [*testator*], deceased, or any other person or persons lawfully claiming through or under him the said [*testator*], deceased, to the contrary, they the said [*trustees for sale*] and [*tenant*

(*d*) There is a peculiarity in these covenants, in expressly extending them to the acts of the trustees for sale, which is necessary here, if it be intended that the covenants shall extend to those acts; because the trustees, deriving their title, not from the testator, but under the act of Parliament, are not included in the denomination of persons claiming under him. Vide ante, p. 376.

for life], or some or one of them, now [are or is lawfully, rightfully, and absolutely seised of the said hereditaments and premises, of an absolute and indefeasible estate of inheritance in fee-simple in possession, without any condition, proviso, power of revocation, limitation of use or uses, or other matter, restraint, cause, or thing whatsoever, which can or may alter, revoke, make void, encumber, or determine the same; *And also*, that, notwithstanding any such act, deed, matter, or thing, as aforesaid, they the said [*trustees for sale*] and [*tenant for life*], or some or one of them, now] have or hath in themselves or himself full power and lawful and absolute authority, by these presents, to convey and assure the said hereditaments and premises, to the uses, upon the trusts, and for the intents and purposes hereinbefore limited and declared concerning the same, according to the true intent and meaning of these presents; *And further*, that the same hereditaments and premises shall, and lawfully may, from time to time and at all times hereafter, remain, continue, and be, To the uses, upon the trusts, and for the intents and purposes hereinbefore declared concerning the same, and shall and may be peaceably and quietly held and enjoyed, and the rents and profits thereof received and taken accordingly, without the lawful interruption or disturbance of the said [*trustees for sale*] and [*tenant for life*], or any of them, or the heirs or assigns of them or any of them, or of any other person or persons lawfully claiming from, through, or under the said [*testator*], deceased; *And that* free and clear, and freely and clearly discharged, or otherwise, by him the said [*tenant for life*], his heirs, executors, or administrators, effectually kept indemnified of, from, and against all and all manner of former and other titles, charges, and incumbrances whatsoever, made, created, occasioned, or suffered, by the said [*trustees for sale*], or the said [*tenant for life*], and [*testator*], deceased, or any other person or persons whomsoever claiming from, through, under, or in trust for him or them, or any of them; *And moreover*, that he the said [*tenant for life*], and his heirs, and the said [*trustees for sale*], and the survivor of them, and his heirs, and all and every other person and persons whosoever lawfully claiming any estate, right, title, trust, or interest of, in, to, or out of the said hereditaments and premises, or any part thereof, will and shall, from time to time, and at all times hereafter, upon every request, and at the

91. UNDER POWER IN ACT OF PARLIAMENT.

that trustees are lawfully seised,

and have power to convey;

—for peaceable enjoyment,

free from incumbrances;

—for further assurance.

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costs and charges of the said [*purchaser*], his heirs, appointees, or assigns, make, do, and execute, or cause to be made, done, and executed, all and every such further acts, deeds, conveyances, and assurances in the law whatsoever, for the more effectually granting, conveying, assuring, and confirming of the same hereditaments and premises unto and to the use of the said [*purchaser*], his heirs, appointees, and assigns, for ever, or otherwise as he or they shall direct or appoint, as by the said [*purchaser*], his heirs, appointees, or assigns, or his or their counsel learned in the law, shall be reasonably advised, devised, or required. IN WITNESS &c.

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92. BY TENANT FOR LIFE UNDER AN INCLOSURE ACT.

92. BARGAIN *and* SALE (*to be inrolled*) *of* COPYHOLD *Lands by a* TENANT *for* LIFE *under a* POWER *in an* INCLOSURE ACT, *to* DEFRAY *the Expenses of the* INCLOSURE, *the Commissioners being made Parties, according to the Directions of the Act* (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*tenant for life*], of &c., of the first part; [*commissioners*], of &c., (two commissioners named in and appointed by an act of Parliament made and passed in the —— year of King William the Fourth, and hereinafter in part recited), of the second part; and [*purchaser*], of &c., of the third part.

Recital of seisin and will;

WHEREAS [*testator*], late of ——, being seised to him and his heirs, according to the custom of the manor of ——, in the county of ——, of sundry hereditaments, situate within and held of the said manor, by his last will and testa-

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As to a tenant for life paying the expense of an inclosure.

(*a*) The General Inclosure Act (41 Geo. 3, c. 109) does not authorize tenants for life to *sell*, in order to defray the expenses of the inclosure, but merely to *charge* the allotments with those expenses. (See *Lee* v. *Alston*, 1 Ves. jun. 78). The precedent of a mortgage-deed of this nature has been given, ante, Vol. 6, p. 222. Where a tenant for life pays the expenses attending the inclosure, though he does not expressly charge them upon the estate as empowered to do by the act, his representatives will have a claim on it for the sum so expended; and the same principle has been held to apply where the payment was made by the owner of a defeasible fee. *Drinkwater* v. *Combe*, 2 Sim. & Stu. 340. See the enactments as to inclosures, stated ante, Vol. 1, p. 463.

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ment in writing, bearing date the —— day of ——, gave all his estates, wheresoever situate or being, to his cousin [*tenant for life*], his heirs and assigns, for ever. AND WHEREAS the said testator, by a codicil to his said will, bearing date the —— day of ——, did revoke the devise in his said will of his real estate to the said [*tenant for life*] and his heirs, and did thereby devise the same to the said [*tenant for life*] during the term of his natural life only, with such remainders over as are therein mentioned. AND WHEREAS the said testator, [*testator*], departed this life some time in or about the month of ——, in the year ——, without having altered or revoked his said will otherwise than by the aforesaid codicil, and without having altered or revoked his said codicil, leaving the said [*tenant for life*] him surviving. And the said will and codicil have since been duly proved by the executor therein named, in the —— Court of ——. AND WHEREAS, at a general customary court held for the said manor, on the —— day of ——, the said [*tenant for life*] was admitted tenant of the said customary hereditaments of which the said [*testator*] died seised; *To hold* to him and his assigns during the term of his natural life, according to the form and effect of the said codicil to the will of the said [*testator*]. AND WHEREAS, by an act of Parliament passed in the —— year of the reign of King William the Fourth, intituled "[*title of act*]," it was among other things enacted, that the said [*commissioners*] should be, and they were thereby appointed commissioners for the purposes of the said act; And they were thereby required, by writing under their hands, to nominate an umpire for determining all differences, if any, between them as therein mentioned. *And it was further enacted*, that it should be lawful for the said commissioners, and they were thereby authorized and required to divide, set out, and allot the open and common fields, and other commonable lands and grounds directed or intended to be divided, allotted, and inclosed by virtue of the said act in the manner therein specified, *And* after deducting certain allotments to be made thereout to the lord of the said manor, for and in lieu of his right to the soil of the wastes of the said manor, and to the impropriator for and in lieu of his tithes, both great and small, arising within the said parish, *It was enacted*, that the said commissioners should set out and allot all the rest, residue, and remainder of the said open and common field, and other commonable lands and

—of codicil;

—death and probate of will;

—of admission of tenant for life;

—of inclosure act;

—power to commissioners to allot open and commonable lands;

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grounds, unto, for, and among all the proprietors of lands, common rights, or other hereditaments therein, for which no allotment or other compensation was thereinbefore specifically directed to be made, in such quantities, parts, shares, and proportions as the said commissioners should adjudge and determine to be a just equivalent, compensation, and satisfaction for their said several lands, common rights, or other hereditaments, in proportion to the respective values thereof, subject to the particular directions therein contained. *And it was further enacted*, that the several hereditaments which should be allotted unto and for the several proprietors, in pursuance of the said act, should be in full lieu, compensation, and satisfaction of and for all the former lands, grounds, right of common, and other rights, and interests in, upon, and from or in respect of the said open and common fields, common meadows, and other commonable lands and grounds. *And it was further enacted*, that it should be lawful for the said commissioners to set out and assign and allot any of the lands or grounds thereby directed to be divided or allotted, or any messuages, buildings, inclosed lands or grounds, or other hereditaments in the parish of ——, aforesaid, in lieu of and in exchange for any other messuages, buildings, lands, tenements, and hereditaments in the same parish, or in any other parish or township adjoining thereto; so as every such exchange should be made under and pursuant to the directions in the said act contained, And every such exchange so made should, as well in respect of the hereditaments within the parish aforesaid, as in respect of the hereditaments within any other parish adjoining thereto, be for ever valid and effectual in the law to all intents and purposes, notwithstanding the want of title in any of the exchanging parties, or any settlement, limitation, use, trust, or incumbrance affecting the hereditaments so exchanged, or any part thereof. *And it was further enacted*, that, as soon as such division and allotment of the said open and common fields, common meadows, wastes, and other commonable lands and grounds aforesaid, should have been completed pursuant to the directions of the said act, the commissioners should form and draw up an award or instrument in writing, according to the particular directions in the said act contained in that respect. *And it was further enacted*, that the several lands and hereditaments which should be respectively allotted and exchanged by virtue of the said

—allotments to be in lieu of right of common;

—power to make exchanges;

—commissioners to make an award;

—allotted lands to be subject to the same uses, &c. as the

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act should, upon the allotment and exchange thereof, become and be of the same tenure, and be held under the same rents and services, and go and remain to the same uses and trusts, and be subject and liable to the same devises, powers, provisoes, conditions, covenants, agreements, charges, and incumbrances, as the hereditaments in respect whereof the same should be respectively allotted and exchanged were or should be subject or liable to, in case the allotment and exchange thereof had not been made, or the said act had not passed, (except as therein mentioned). *And it was further enacted*, that all the costs, charges, and expenses of soliciting and passing the said act, and of surveying, admeasuring, and valuing as well the said open and common fields, and other commonable lands and grounds thereby directed to be divided and inclosed, and of dividing and allotting the same common and open fields and other commonable lands and grounds, and of forming and making the public roads, public or common drains, sewers, water-courses, watering-places for cattle, wells, bridges, and other conveniences which should be set out by virtue of the said act, and of making such exchanges as aforesaid, and of preparing and inrolling the said award, and all other the costs, charges, and expenses of the said commissioners, and of the several persons employed by them, either before or after the execution of the said award, in and about or concerning the execution of the said act, and not therein otherwise directed to be paid, should be paid, borne, and defrayed by all the owners of, or persons interested in, as well the said open and common fields and other commonable lands and grounds, as the lands, tenements, and hereditaments which should be respectively exonerated from tithes, and exchanged by virtue of the said act, except as therein mentioned, in proportion as near as might be to their respective estates and interests, (due regard being had to the expenses occasioned by each person's estate, and also to the value thereof), and that the shares and proportions of the said costs, charges, and expenses to be borne by the said respective owners and persons interested should be settled and ascertained by the said commissioners, and should be paid to such person or persons, and at such time or times, either before or after the execution of the said award, as the said commissioners should direct or appoint. *And it was further enacted*, that it should be lawful for the said several owners and proprietors for the time being of all or any of the lands

lands in respect of which the allotment is made;

—expenses of the inclosure to be borne by the several owners;

—power to tenants in tail and for life, with the consent of

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and grounds, as well inclosed as commonable, in the said parish of ——, being tenants in tail, or for life or lives only, by indenture or indentures duly sealed and delivered, and inrolled in any of his Majesty's Courts of record at Westminster, and with the consent of the said commissioners, to be testified in writing under their respective hands and seals, either before or after they should have made their award, to sell and convey to any person or persons whomsoever such part or parts of any old inclosures belonging to such owner or proprietors respectively, or such part or parts of any new allotment or allotments, to be assigned or allotted to them respectively, by virtue of the said act as should be eligible, sufficient, and necessary for the purpose of defraying and paying the respective proportions of the charges and expenses of obtaining and passing the said act, and other necessary charges incident to and attending such inclosure and division, and the execution of the other powers contained in the said act, and also the charges of such sale, and all other necessary expenses attending the same, to be ascertained by the said commissioners. And that the person or persons to whom any such old inclosures, or new allotment or allotments, or any part or parcel thereof respectively, should be sold and conveyed as aforesaid, and all persons claiming under them, should and might have, hold, possess, and enjoy the same respectively, peaceably, and quietly, according to the terms of the sale and conveyance thereof, without any interruption from the person or persons to whom any such old inclosures for the time being should belong, or to whom any such allotment or allotments should be made in and by the said award, or from any person or persons whomsoever claiming under them or any of them, any settlement, will, use, trust, remainder, limitation, or other impediment or incumbrance to the contrary notwithstanding. *And it was provided and enacted*, that no such sale, conveyance, or grant of any old inclosure or new allotments as aforesaid, which should be made by virtue and in pursuance of the said act, should be valid and effectual unless the said commissioners should certify their consent thereto and approbation thereof, by signing and sealing the same as parties thereto. *And further*, that, in cases where any messuages, lands, tenements, and hereditaments might be sold in pursuance of the said act as aforesaid, it should be lawful to sell the same, either by public auction or private contract, provided that, in case

commissioners, to sell and convey,

—for the purpose of defraying expenses;

—commissioners to be parties to conveyances;

—mode of sale;

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of sale by private contract, the said commissioners should be satisfied that the price agreed to be given for the same was not less than the actual value thereof, according to any estimate made or directed to be made by them, and verified by oath, which any one of the commissioners was thereby empowered to administer. *And it was also provided*, that, when they the said commissioners should judge it necessary to direct any such sale by public auction, in pursuance of the said act, it should not be necessary to require any such estimate as was thereby required in cases of sale by private contract.

—commissioners' award;

And whereas, by an award in writing under the hands and seals of the said [*commissioners*], the commissioners named in the said act, And also of [*umpire*], the umpire by them appointed, and by them made in pursuance of the said act, by indenture bearing date the —— day of ——, and inrolled in the Court of Chancery within the time limited by the said act, the said [*commissioners*] and [*umpire*] did, amongst other things, declare that they had set out and allotted, and they did thereby award unto the devisees of the said [*testator*], as an exchange, equivalent, compensation, and satisfaction for and in lieu of a certain garden and parcel of land therein mentioned to be thereby exchanged, and therein awarded to [A. B.], and also in lieu of all the copyhold lands, common fields, and common meadow land, and right of common belonging to the copyhold messuages and lands of the said [*testator*], (amongst other allotments), All those two several allotments, pieces, or parcels of copyhold land hereinafter particularly described, and intended to be hereby conveyed and assured (*b*).

—payment of expenses by tenant for life;

And whereas the said [*tenant for life*] hath paid and expended divers sums of money in defraying his proportion of the charges and expenses of obtaining and passing the said act, and other necessary charges incident to and attending such inclosure and division, and execution of the other powers contained in the said act, and which said several sums amount, in the whole, to the sum of £——.

—allowance by commissioners;

And whereas a true and correct statement of the several sums so expended by the said [*tenant for life*] hath been exhibited and laid before the said [*commissioners*], the

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(*b*) The purchaser ought to be furnished with an authenticated extract from the award, and a copy of the act of Parliament by virtue of which the inclosure is made. Vide ante, Vol. 1, pp. 75, 462.

Evidence of title to allotment.

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commissioners named in and appointed by the said act, who have duly examined into the same, and have had the several payments duly vouched before them; and they the said commissioners have ascertained the said sum of £—— to be a fair and reasonable claim, and ought to be allowed to the said [*tenant for life*]; And they the said commissioners do hereby allow of the same accordingly. AND WHEREAS the said [*tenant for life*], being desirous of availing himself of the provisions for that purpose contained in the said act, hath applied to the said [*commissioners*], the commissioners named therein, for their consent to a sale and conveyance of such parts of the said allotments so assigned and allotted to the devisees of the said [*testator*], as aforesaid, or of any old inclosures belonging to them, as shall be ascertained by the said commissioners to be eligible, sufficient, and necessary for paying and defraying the said sum of £—— so by him the said [*tenant for life*] expended as aforesaid, and also the charges of such sale, and all other necessary expenses attending the same. And, in consequence of such application, they the said commissioners have selected and directed the allotments, pieces, and parcels of ground hereinafter mentioned and described, and intended to be hereby conveyed and assured, (being part of the hereditaments so assigned and allotted to the devisees of the said [*testator*] as aforesaid), to be sold and conveyed for the purposes aforesaid, together with other hereditaments, by public auction, for the best price or prices that could be had or gotten for the same. AND WHEREAS, in pursuance of such direction of the said commissioners, the allotments, pieces, or parcels of ground hereinafter mentioned and described were, together with other hereditaments, put up to sale by public auction by Mr. ——, at the —— on the —— day of ——, pursuant to public advertisements and printed particulars and conditions, published previously to such sale; at which sale the said [*purchaser*] attended, and, being the highest bidder for, was declared and allowed to be the purchaser of, the allotments, pieces, or parcels of land and hereditaments hereinafter mentioned and described, and intended to be hereby conveyed and assured, (being lots 2 and 3 in the aforesaid particulars of sale), at or for the price or sum of £——. AND WHEREAS the proportion of the said [*tenant for life*] of the charges of the aforesaid sale, and the other necessary ex-

—application by tenant for life to commissioners to select allotments for sale, to pay the expenses of the inclosure;

—sale by auction, and purchase;

—amount of expenses;

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penses attending the same, have been ascertained by the said commissioners to amount to the sum of £——. AND WHEREAS the said purchase-money, or sum of £——, and also the said sum of £——, at which a certain old inclosure in the said parish of ——, which devolved to the said [*tenant for life*], during his life, under and by virtue of the said will and codicil, was sold and conveyed to [R. S.], by and with the consent of the said commissioners, and making together the sum of ——, do not exceed the said two sums of £—— and £——, being the amount of the allowed proportion of him the said [*tenant for life*] of the charges and expenses of obtaining and passing the said act, and other necessary charges incident to and attending such inclosure and division, and the execution of the other powers contained in the said act, and also the charges of such sale, and all other necessary expenses attending the same, as aforesaid. NOW THIS INDENTURE WITNESSETH, that, for completing the said purchase of him the said [*purchaser*], so made as aforesaid, and in consideration of the sum of £—— of lawful British money to the said [*tenant for life*], at or before the sealing and delivery of these presents paid by the said [*purchaser*], by the direction and appointment of the said [*commissioners*], the commissioners appointed by the above in part recited act, as aforesaid, (testified by their severally signing and sealing these presents), the receipt of which sum of £—— the said [*tenant for life*] doth hereby acknowledge, and from the same doth acquit and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, for ever, by these presents, He the said [*tenant for life*], pursuant to the power and authority in him vested, or to him given, in and by the hereinbefore in part recited act, and by and with the consent, concurrence, and approbation of the said commissioners, (testified as aforesaid), by this present indenture by him the said [*tenant for life*] duly sealed and delivered, and intended to be inrolled pursuant to the direction of the said act, *Doth* grant, bargain, sell, and convey unto the said [*purchaser*], and his heirs, ALL &c. (*parcels*), and all houses, &c., and the reversion (*c*), &c. TO HAVE

—that purchase-money does not exceed the expenses.

Testatum.

In consideration of purchase-money paid to tenant for life, he, with consent of commissioners, conveys to purchaser.

Premises.

Habendum.

(*c*) As the conveyance is made under a statutory power, the estate clause, which was inserted in the draft from which this precedent was taken, seems to be quite as inapplicable as it is in the case of an appointment under a power created by the act of the party. In this respect, the

92. BY TENANT FOR LIFE, UNDER AN INCLOSURE ACT.

AND TO HOLD the said closes, pieces, or parcels of land, and all and singular other the premises hereby sold and conveyed as aforesaid, or expressed and intended so to be, with the appurtenances, unto the said [*purchaser*] and his heirs, To THE ONLY USE and behoof of the said [*purchaser*], his heirs and assigns, for ever, and to and for no other use, intent, or purpose whatsoever. (*Covenant by tenant for life that he has not incumbered, and for further assurance, ut ante, p.* 546). IN WITNESS &c. (*d*).

Covenants.

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present precedent differs from the last, where the fee, and not merely a power over it, being vested in the persons empowered to sell, the clause was proper.

(*d*) This draft was settled by a gentleman of eminence now deceased. He wrote upon it as follows :—

Opinion accompanying the draft.

"Upon the construction of the clause in the act, empowering a sale for defraying the expenses of the inclosure, a doubt may possibly arise whether it extends to the copyhold allotments, that tenure not having been expressly mentioned in the clause in question. But, taking it for granted that the copyhold allotments are comprised in the clause mentioned, (and I conceive that they are), then, clearly, this present conveyance by bargain and sale is a sufficient execution of the power of sale in the act, *without any surrender*. But it will be necessary that the purchaser should be admitted, and pay his fine for such admission to the lord."

Ad valorem stamp duty.

As the present deed supersedes the necessity of a surrender, it must bear the ad valorem duty, which would otherwise have been placed on the latter. Vide ante, p. 538.

Sale under land-tax act, &c.

The precedent in the text might easily be adapted to a conveyance by a tenant for life under the power of sale contained in the land-tax redemption act, 42 Geo. 3, c. 116, ss. 51, 54, or under any other statutory power. [When tenant for life, without impeachment of waste, sells part of the land for the purpose of redeeming the land-tax on the rest under the stat. 43 Geo. 3, c. 116, the growing timber of course passes with the land, although not mentioned, and the price of it, as well as of the land, must be paid into the Bank of England, under sect. 98. *Doe* d. *Blewitt* v. *Phillips*, 4 Per. & D. 562; 1 Q. B. R. 84.]

Sale of estate and timber by tenant for life.

93. DEED *of* CONVEYANCE *of* FREEHOLDS *on a Sale by a* CONTINGENT REMAINDER-MAN *in Fee* (*a*).

93. CONTINGENT SHARE IN FREEHOLDS UNDER A WILL.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part. WITNESSETH, that, in consideration of the sum of £—— sterling already paid by the said [*purchaser*] to the [*vendor*], (the receipt whereof is hereby acknowledged), he the said [*vendor*] *Doth*, by these presents, grant, bargain, sell, and confirm unto the said [*purchaser*] and his heirs, ALL THAT the remainder in fee-simple, expectant on the determination of the estate for life of [*tenant for life*], of &c., the mother of the said [*vendor*], and all other the estate and interest, if any, of the said [*vendor*] in (*b*), ALL THAT (*parcels, and general words*); And all the

Parties.

Testatum.

Vendor grants

remainder in

parcels.

(*a*) In this case the devise is supposed to have been to A. for life, with remainder in fee to such of her children as should be living at her death, and the vendor, being one of the children of A., contracts for the sale of his contingent share in his mother's lifetime. The precedent assumes two propositions: *first*, that such an interest is transferable by indenture alone without a fine, and though the assurance is not by demise; and, *secondly*, that the grantor's want of a present estate ought not to be disclosed on the face of the deed, both which have been the subject of discussion in antecedent parts of the present work, (ante, p. 418; also, Vol. 4, p. 112,) [and may now be considered as well established.] The covenants for title are therefore inserted in a separate deed in order to avoid disclosing the exact state of the title on the face of the conveyance. See the next precedent. A purchaser of a contingent interest of this kind is exposed to the risk of the expectant share wholly failing in event by the death of the vendor in the lifetime of his mother, or being diminished by her having other children; though, on the other hand, it is liable to accretion by the diminution in the number of the existing children by death: to these risks must be added, unless the contingent remainder be preceded by a limitation to trustees to preserve in the usual manner, that of its being destroyed by the tenant for life. Vide ante, p. 419.

Remarks on the precedent in the text.

(*b*) Where a conveyance is made by the expectant member of an unascertained class, it ought always to be so framed, unless the contrary be intended, as to comprise the entire estate, it being possible that, in event, the entirety may devolve to him as the sole object. Thus if, a devise having been made to the children of A. living at her death, one of the sons of A., in her lifetime, sells his contingent interest, the conveyance

As to conveyances by the presumptive members of an unascertained class.

93. CONTINGENT SHARE IN FREEHOLDS UNDER A WILL.

estate, right, title, benefit, claim, and demand whatsoever, both at law and in equity, of him the said [*vendor*], in, to, and of the said remainder, hereditaments, and premises,

Habendum.

To HAVE and to hold the said remainder, hereditaments, and premises, hereby granted and confirmed, or intended so to be, unto the said [*purchaser*], and his heirs for ever; To

To use of purchaser in fee.

THE USE of the said [*purchaser*], his heirs, and assigns, for ever (*c*); and to or for no other use, intent, or purpose, whatsoever. IN WITNESS &c.

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should not be confined to the expectant share, according to the existing number of children, but should extend to the entirety; which, in the event of his being the only surviving child, would belong to him. The precedent in the text has been framed on this principle.

(*c*) If to uses to prevent dower, proceed ut ante, p. 73. As a remainder, of course the property is not liable to dower; but, on the determination of the prior estate for life, it would become so.

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94. COVENANTS TO ACCOMPANY CONVEYANCE BY ESTOPPEL.

94. DEED *of* COVENANTS *to accompany a Conveyance by a* CONTINGENT REMAINDER-MAN (*last Precedent*).

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*] of &c., of the other part. (*Recite will of late owner, by which all his real property was devised to the vendor's mother, for life, with remainder in fee to such of her children as should be living at her decease; the death of testator, and probate of his will, in the usual manner*).

Recitals.

AND WHEREAS the said [*tenant for life*] is still living, and is of the age of —— years, or thereabouts. AND WHEREAS the said [*tenant for life*] hath four children, namely, the said [*vendor*], and [A. B.], [C. D.], and [E. F.] AND WHEREAS the said [*vendor*], lately contracted with the said [*purchaser*] for the absolute sale to him of his contingent remainder in fee, expectant on the decease of the said [*tenant for life*], in the —— and hereditaments hereinafter described, at or for the price or sum of £——. AND WHEREAS, by an indenture bearing even date with these presents, and made between the said [*vendor*], of the one part, and the said [*purchaser*], of the other part, the said [*vendor*], in consideration of the said sum of £—— paid to him by the said [*purchaser*], did grant, bargain, sell, and

confirm unto the said [*purchaser*], his heirs and assigns, *All that* (*follow the words of the deed*), *To hold* the same remainder and premises unto and to the use of the said [*purchaser*], his heirs and assigns, for ever. AND WHEREAS the said [*vendor*] hath agreed with the said [*purchaser*] to enter into the covenants hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and for the considerations expressed in the hereinbefore-recited indenture, he the said [*vendor*], for himself, his heirs, executors, and administrators, Doth hereby covenant and agree with the said [*purchaser*] and his heirs, that, notwithstanding any act, deed, matter, or thing whatsoever, made, done, occasioned, or suffered by the said [*vendor*], or by the said [*testator*], his late father, deceased, to the contrary, he the said [*vendor*], at the time of the execution of the hereinbefore-recited indenture, had full power, and lawful and absolute authority, to grant, bargain, sell, and confirm unto and to the use of the said [*purchaser*], his heirs and assigns, for ever, such contingent remainder in fee-simple, expectant on the determination of the estate for life of the said [*tenant for life*], of and in the said hereditaments and premises, as presumptively belonged to him the said [*vendor*], as one of the children of the said [*tenant for life*], according to the tenor and effect of the hereinbefore-recited devise; And also, that it shall be lawful for the said [*purchaser*], his heirs and assigns, from time to time, and at all times for ever after the decease of the said [*tenant for life*], in case the said [*vendor*] shall survive her, peaceably and quietly to hold and enjoy the said hereditaments and premises, or such aliquot part or share therein, as may happen to devolve or accrue to him the said [*vendor*], according to the tenor and effect of the said devise; and to receive the rents and profits thereof for his and their absolute use and benefit, without any interruption or disturbance whatsoever from or by the said [*vendor*], or his heirs, or any person or persons lawfully claiming through or under him or them, or through or under the said [*testator*], deceased; *And that* free and clear of and from all titles, charges, and incumbrances, whatsoever, created or occasioned by the said [*vendor*], or by the said [*testator*], deceased, or by or through the acts, defaults, privity, or procurement of them respectively; *And lastly*, that he the said [*vendor*] and his heirs, and every person lawfully claiming through or under him or them, or through or under the

94. COVENANTS TO ACCOMPANY CONVEYANCE BY ESTOPPEL.

Testatum.

Vendor covenants that, notwithstanding &c., he had power to grant;

—for quiet enjoyment;

—free from incumbrances;

—and for further assurance.

94. COVENANTS TO ACCOMPANY CONVEYANCE BY ESTOPPEL.

said [*testator*], deceased, will from time to time, and at all times hereafter, on the request and at the costs of the said [*purchaser*], his heirs or assigns, make, do, and execute such further deeds, acts, and assurances, for the more effectually granting or otherwise assuring the said remainder and premises so contracted to be sold by the said [*vendor*] to the said [*purchaser*], and expressed to be conveyed by the said indenture bearing even date with these presents, as aforesaid, unto and to the use of the said [*purchaser*], his heirs and assigns, for ever, in the manner hereinbefore mentioned, as by the said [*purchaser*], his heirs or assigns, or his or their counsel in the law, shall be reasonably advised and required, and tendered to be executed. IN WITNESS &c.

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95. RELEASE OF CONTINGENT INTEREST IN COPYHOLDS.

95. [RELEASE *of* CONTINGENT INTERESTS *in* COPYHOLDS *to a* PURCHASER *who has been already* ADMITTED *under a* SURRENDER *by the* OWNERS *of the* SUBSISTING VESTED ESTATES. *The Covenants for Title are comprised in the same Deed* (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*tenant for life*], of &c., widow, of the first part;

As to the alienation or destruction of contingent estates in copyholds.

(*a*) [The union of a life estate with a vested remainder will not destroy mesne contingent remainders in copyholds; 2 Roll. Abr. 794, pl. 6, *Mildmay* v. *Hungerford*, 2 Vern. 243; *Habergham* v. *Vincent*, 2 Ves. 204; *Stansfield* v. *Habergham*, 10 Ves. 282; *Roe* v. *Briggs*, 16 East, 413, ante, p. 582; nor will a surrender of copyholds by a contingent remainderman operate by estoppel. *Doe* d. *Blacksell* v. *Tomkins*, 11 East, 185. But, according to the case of *Roe* v. *Briggs*, ante, p. 582, by means of an enfranchisement with the concurrence of all parties having vested estates in possession and in remainder or reversion, all contingent *remainders* properly so called in copyholds may be destroyed. The doctrine of this case is perhaps questionable; but it is clear that a contingent estate in or right to copyholds may be released to the person immediately entitled, *after he has been admitted; Hull* v. *Sharbrooke*, Cro. Jac. 36; *Kite* v. *Queinton*, 4 Rep. 25; Co. Litt. 59. a.; *Doe* d. *Milner* v. *Brightwen*, 10 East, 595. If, therefore, all the parties to whom the contingent estates are limited are in esse and sui juris, a good title to the fee may be made by a surrender of all the vested estates to the use of the purchaser, and a release to him after his admittance by the owners of

[*releasors*], of &c., of the second part; and [*purchasers*], of &c., of the third part. WHEREAS [*testator*], of &c., by his last will, bearing date the —— day of ——, gave and de- 95. RELEASE OF CONTINGENT INTEREST IN COPYHOLDS.

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the contingent estates. This view appears to be fortified by the following opinion of Mr. Fearne, upon a case where Mrs. F. was tenant in fee, with an executory devise, in case of her death without issue, to her sister C. B.

[" A surrender has been thought not to operate by estoppel so as to bind a future executory interest in copyholds as a fine does in freeholds. But I rather incline to think, that if Mr. and Mrs. F., and her sister, all join in *a contract* to convey the copyhold part of the estate to the purchaser for an adequate valuable consideration*, and, in pursuance of that contract, they join in a surrender to the use of the purchaser and his heirs, and then C. B. releases the executory limitation, and all benefit thereof, and all her claim and title under it, to the purchaser, after his admittance under the surrender, C. B.'s heirs will be bound, and the purchaser thereby acquire a title to the copyhold. This conclusion depends on principles too long to be here detailed, but such is the inclination of my opinion."—Posth. Works, 108.] Mr. Fearne's opinion.

[The case of *Doe* d. *Dormer* v. *Wilson*, 4 B. & Al. 303, has been cited as an authority that a contingent remainder in copyholds cannot be affected by any means; but neither the decision nor the doctrine laid down by the court went so far. In that case a copyhold estate in remainder expectant on the life of J. W. was surrendered to the use of husband and wife during their lives and the life of the longest liver, and after the decease of the survivor to the right heirs of the survivor for ever. The husband and wife subsequently surrendered the estate to the use of H. P. and his heirs, under whom the defendant was in possession. The wife survived her husband, and died, leaving the lessor of the plaintiff her heir, and the question principally discussed was, when his right of entry accrued, for, if the wife could have entered on the death of her husband, the action was barred by the Statute of Limitations. It was held, that the husband and wife took a vested estate for their joint lives, and for the life of the survivor, with a contingent remainder in fee to the survivor, so that, the former estate having been aliened before the contingency happened, the wife had no right of entry on the death of her husband. It was assumed, as too clear for argument, that the surrender, to which the reversioner was not a party, did not pass or defeat the contingent remainder; but it was not laid down, either in argument or by the court, that there were no means of disposing of such an interest.] *Doe* d. *Dormer* v. *Wilson*.

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* [Mr. Fearne's object in directing a contract to be entered into was probably to obviate any difficulty as to the payment of the purchase-money while the transaction remained in an incomplete state, in the interval between the surrender and the release to the purchaser. When any difficulty on this head is apprehended, the purchase-money may be deposited with a third person to be held upon trusts declared by a written agreement.]

95. RELEASE OF CONTINGENT INTEREST IN COPYHOLDS.

vised (among other hereditaments) all the copyhold hereditaments hereinafter described unto and to the use of his wife the said [*tenant for life*], for her life, and after her decease unto and to the use of such one or more of his (the said testator's) daughters as should be living at the time of the decease of his said wife, or should have died in her lifetime, leaving lawful issue them respectively surviving, and their respective heirs and assigns, equally to be divided amongst them as tenants in common (*b*). AND WHEREAS the said testator departed this life on the —— day of ——, and his said will was proved at ——, by the executors therein named. AND WHEREAS the said [*releasors*], parties hereto, are the only surviving children and customary co-heiresses of the said testator. And [*deceased daughter*] now deceased, was the only other child of the said testator. And the said [*deceased daughter*] died on the —— day of ——, at the age of ——, without issue, and is buried at ——. AND WHEREAS at a court held on the —— day of ——, for the manor of ——, whereof the hereditaments hereinafter devised are holden, the said [*tenant for life*] was admitted tenant of the said hereditaments for the term of his natural life. AND WHEREAS the said [*tenant for life*] and [*releasors*] lately contracted with the said [*purchaser*] for the sale to him of the said hereditaments and the absolute fee-simple thereof at the price of £——. AND WHEREAS the said [*tenant for life*] and [*releasors*] did accordingly on the —— day of ——, surrender the said hereditaments into the hands of the lord of the said manor of ——, *to the use* of the said [*purchaser*], his heirs and assigns for ever. Upon which surrender the said [*purchaser*] was, on the —— day of ——, duly admitted tenant of the said hereditaments; to hold the same unto him the said [*purchaser*], his heirs and assigns for ever, at the will of the lord, according to the custom of the said manor. AND WHEREAS, for the purpose of perfecting the title of the said [*purchaser*], the said [*releasors*] have agreed to execute the release hereinafter contained, and the said [*tenant for life*] hath agreed to join in these presents for the purpose of

Recital of devise of copyholds to testator's wife for life, remainder to such of his daughters as should survive her in fee;

—death of testator,

—that releasors are only children and co-heiresses;

—admittance of tenant for life;

—sale to surrender to the use of and admittance of purchaser;

—agreement to execute release.

(*b*) [Under these limitations the daughters took remainders in fee simple, contingent on their surviving their mother or leaving issue. See *Letheieullier* v. *Tracy*, 3 Atk. 793; *Buckworth* v. *Thirkell*, 3 Bos. & P. 652, n.; 1 Collect. Jur. 332; *Doe* d. *Herbert* v. *Selby*, 3 B. & Cr. 926; *Greene* v. *Ward*, 1 Russ. 264.]

95. RELEASE OF CONTINGENT INTEREST IN COPYHOLDS.

entering into the covenants hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the said purchase money or sum of £——, already paid by the said [*purchaser*] to the said [*tenant for life*] and [*releasors*], the said [*releasors*] *Do*, and each of them *Doth*, for themselves and herself and their and her heirs for ever, by these presents, release, ratify, and confirm unto the said [*purchaser*], and his heirs, ALL (*parcels*), with their actual and reputed appurtenances; And all the estate, right, title, possession, interest, right of entry or admission, claim and demand whatsoever, present or future, in possession, remainder, or reversion, and whether vested or executory, or contingent or in expectancy, possibility, or otherwise howsoever, either at the common law, or by custom, or in equity, or how otherwise soever of them, the said releasors, and of each of them, and of the heirs of them, and of any of them, in, to, of, upon, or in respect of the said hereditaments and premises, or any of them, or any part thereof respectively. TO HOLD the said hereditaments and premises unto the said [*purchaser*], his heirs and assigns henceforth for ever, at the will of the lord, according to the custom of the said manor of ——, by and under the accustomed rents and services, absolutely released, freed, and discharged from all and every the executory and other future estates limited or created by the above-recited will of the said [*testator*], deceased. AND the said [*tenant for life*], for herself, her heirs, executors and administrators, and only for and against the acts and defaults of herself and of all persons claiming by, through, under, or in trust for her, and also for and against the acts and defaults of the said [*testator*] deceased, and of all persons claiming, by, through, under, or in trust for him, so far as such last-mentioned acts and defaults may concern the right to surrender or otherwise assure the said hereditaments and premises, or the quiet enjoyment, freedom from incumbrances, and further assurance thereof, during the life of the said [*tenant for life*]; and the said [*releasors*], each of them covenanting for herself, her heirs, executors, and administrators, and only for and against the acts and defaults of herself and her heirs, and of all persons claiming by, through, under, or in trust for her, them, or any of them, and also for and against the acts and defaults of the said [*testator*], so far as such last-mentioned acts and defaults may concern the right to surrender, release, or

Testatum.

Devisees in remainder release to purchaser.

Parcels.

All the estate.

Habendum to purchaser and his heirs.

Short covenants by tenant for life and devisees in remainder, that the premises have been well assured;

95. RELEASE OF CONTINGENT INTEREST IN COPYHOLDS.

otherwise assure one equal —th part or share of the said hereditaments and premises, or the quiet enjoyment, freedom from incumbrances, or further assurance of such one equal —th part or share, from and after the decease of the said tenant for life for ever, Do hereby respectively covenant with the said [*purchaser*] and his heirs that, by means of the said surrender of the —— day of ——, and the said admittance of the said [*purchaser*] thereon, and of these presents, or of some or one of them, the said hereditaments and premises have been and now are well, effectually and absolutely assured unto and vested in the said [*purchaser*], his heirs and assigns for ever, for a good, indefeasible, and unconditional estate in fee-simple, according to the custom of the said manor, free from all incumbrances; *And* that it shall be lawful for the said [*purchaser*], his heirs and assigns, from time to time and at all times hereafter to enter upon, hold, and enjoy the said hereditaments and premises, and receive and take the rents and profits thereof, without any eviction, interruption, or denial; and that free and clear, and freely and clearly exonerated, discharged, or otherwise indemnified from and against all and all manner of former and other estates, titles, charges, and incumbrances; *And moreover*, that, from time to time, and at all times hereafter, upon every request of the said [*purchaser*], his heirs or assigns, all such further and other lawful acts, deeds, surrenders, releases, and assurances, shall be made, done, executed, and perfected for the further, better, or more effectually or satisfactorily surrendering, releasing, or otherwise assuring the said hereditaments and premises unto or to the use of the said [*purchaser*], his heirs and assigns, or otherwise as he or they shall direct, as by the said [*purchaser*], his heirs or assigns, shall be reasonably devised and required. IN WITNESS &c. (*c*).]

—for quiet enjoyment;

—free from incumbrances;

—and for further assurance.

Stamp.

(*c*) [This deed will require the common deed stamp only. It will be proper to enter on the court-rolls either the deed itself, or a short memorandum to the following effect:—

Memorandum of release to be entered on the courts-rolls.

"BE IT REMEMBERED, that, by indenture, dated &c., and made between &c., the said [*releasors*], did release unto the said [*purchaser*], and his heirs, all their estate and interest, whether present or future, vested or contingent, in ALL (*parcels*), to which hereditaments the said [*purchaser*] was admitted on the —— day of ——."]

96. [ASSIGNMENT *of the* BENEFIT *of an* AGREEMENT *for the* PURCHASE *of a* FREEHOLD ESTATE, *with a* PROVISO *for* REPURCHASE *by the present Assignor* (*a*).

96. CONDITIONAL ASSIGNMENT OF BENEFIT OF CONTRACT FOR PURCHASE.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*] of &c., of the one part, and [*purchaser*] of

Parties.

(*a*) [This precedent is founded on the case of *Perry* v. *Meadowcroft*, stated infra, p. 622. See the cases as to defeasible purchases collected ante, Vol. 5, p. 81, et seq. Since the publication of that volume, the doctrine, which was in a state of great uncertainty, has been settled upon sound and intelligible principles. The rule that a mortgagee cannot stipulate for any advantage beyond legal interest, and cannot clog the equity of redemption by any condition or restriction, "cannot by special terms alter what the court says are the special terms of the contract," (7 Ves. 273), was well understood to admit of no exception; but the difficulty in applying it to practice was to determine where an agreement for repurchase at a particular time or in a particular event would make that a mortgage which the parties had cast into the shape of a sale. The key to this difficulty has been furnished by Lord Cottenham, C., in the recent case of *Williams* v. *Owen*, where the rule was broadly laid down, that wherever the redemption-money constitutes a *debt* from the original owner of the property, for which he is liable to be sued, in other words, wherever the other party has a personal security in addition to the property, the transaction, however disguised, is a mortgage; but if the right to redeem on the one hand is not accompanied by a right to sue on the other—if the party made liable to redemption has not the rights of a mortgagee*, then it is a conditional or defeasible sale, and the vendor has no rights beyond those which he has expressly stipulated for†.]

Conditional purchases, how distinguished from mortgages.

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* [The word mortgagee is here used in its popular sense of a creditor having security on property, not in its more technical one of a creditor having security on property with the right to *foreclose*. For a security by deposit, or with a *mere* trust for sale, does not include the right to foreclose. Vide ante, Vol. 5, pp. 108, 124, 443; *Sampson* v. *Patteson*, 1 Hare, 533; *Dyson* v. *Morris*, id. 413. As to Welsh mortgages and other peculiar forms of mortgage security, vide ante, Vol. 5, p. 96, and *Balfe* v. *Lord*, 2 Dru. & W. 480.]

As to foreclosure.

† [In *Paine* v. *Hyde*, 4 Beav. 468, a testator gave a legacy to A. in the event of B. dying unmarried; but, upon condition that A. should, within three years from the testator's death, pay all the money due from him to the testator, to his executors. Payment after the three years was held to be, under the circumstances, a substantial perform-

What is a sufficient compliance with a condition in a will.

96. CONDITIONAL ASSIGNMENT OF BENEFIT OF CONTRACT FOR PURCHASE.

&c., of the other part. WHEREAS on the —— of —— last, an estate, called ——, situate at ——, and comprising ——

Conditional purchases.

Williams v. *Owen.*

[In *Williams* v. *Owen*, 10 Sim. 386, Williams, a solicitor, executed an absolute conveyance of an estate in pursuance of a contract for sale, to the defendant Owen, in consideration of 550*l.*, consisting of a bond debt of 200*l.*, and cash paid at the time. The defendant paid the expenses of the conveyance, and entered into possession, having about the same time executed an agreement, that in case the plaintiff should, within a year, pay to the defendant the 550*l.*, and 13*l.*, being the expenses of the conveyance, the defendant would re-convey, being allowed to retain the rents in lieu of interest, if he should desire to do so. It did not clearly appear that the defeazance was executed at the same time as the conveyance, although it bore the same date. Sir L. Shadwell, V. C., decreed redemption, observing merely, "The agreement to redeem need not be made at the same time as the conveyance, as appears from the judgment of Sir W. Grant, M. R.; *Sevier* v. *Greenway*, 19 Ves. 413; and if that decision be right, I am bound by it, and I do not see how I can avoid deciding that the plaintiff in this case is entitled to redeem."]

Remarks on the decision of the Vice-Chancellor.

[Now, it had never been disputed that, if the purchase was originally absolute, an independent agreement to re-convey on certain terms, would not convert it into a mortgage; *Davis* v. *Thomas*, 1 Russ. & My. 506; and the case of *Sevier* v. *Greenway*, relied upon by the Vice-Chancellor, appears to be a distinct authority against his Honor's decision. There, in 1799, the defendant, who had taken an assignment of a mortgage, purchased the equity of redemption from the mortgagor, subject to a proviso for re-purchase within two years, on payment of the purchase-money and *unlawful* interest*. Some months afterwards the plaintiff and defendant executed an agreement, authorizing the latter to expend money in repairs, and charging the sums to be expended with interest, on the premises; in short, treating the relation between the parties in all respects as that of mortgagor and mortgagee; and on that ground Sir W. Grant decreed redemption: but he said, "If this had rested upon the conveyance of 1799, I do not see why it should be considered otherwise than as a sale."]

Judgment of Lord Cottenham in *Williams* v. *Owen.*

[The decision of the Vice-Chancellor, in *Williams* v. *Owen*, was reversed by Lord Cottenham, C., on appeal, 5 Jur. 114. His Lordship said, "That this Court will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, if it appears that the parties intended it to be a mortgage, is no doubt true; but it is equally clear, that if the parties intended an absolute sale, a contemporaneous agreement for a re-purchase, not acted upon, will not of itself entitle the vendor to redeem. From the case of *Barrell* v. *Sabine*, 1 Vern. 268, this appears to have been recognised as a well-known rule of equity about 150 years ago. The question always is, was the original

ance of the condition. There the contest was between volunteers, but where the question arises upon a contract inter partes a more strict interpretation is adopted. See *Davis* v. *Thomas*, 1 Russ. & M. 506.]

* [Unless the transaction was a mortgage, this was not usurious.]

acres, was advertised for sale by public auction, at the —— Hotel, in seven lots, according to a plan and particulars then

96. CONDITIONAL ASSIGNMENT OF BENEFIT OF CONTRACT FOR PURCHASE.

transaction a bonâ fide sale, with a contract for a re-purchase, or was it a mortgage in the form of a sale? In *Mellor* v. *Lees*, 2 Atk. 495, Lord Hardwicke puts the case thus as to the contract: 'whether it is a transaction that is in its nature a mortgage, or a defeasible purchase, and subject to a re-purchase?' In *Goodman* v. *Grierson*, 2 Ball. & B. 279, Lord Manners puts the case upon the same ground, and says, the fair criterion by which the court is to decide whether this deed is a mortgage or not, I apprehend to be this: *Are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to?* Tried by this test, there could be no doubt but that in this case the transaction was not a mortgage. In *Ensworth* v. *Griffiths*, 5 Bro. P. C. 184, the relation of a mortgagor and mortgagee had existed, and the mortgagor, in consideration of the debt, and of a further sum paid, released the equity of redemption, and at the same time the mortgagee signed an agreement to re-convey the premises upon payment of the two sums within one year. In the Exchequer there was a decree for redemption, but that was reversed, and the bill dismissed in the House of Lords. *Davis* v. *Thomas*, 1 Russ. & My. 506, was very similar in circumstances, and the same principle was acted upon. In *Sevier* v. *Greenway*, 19 Ves. 412, Sir W. Grant said that, if the case had rested upon the conveyance of November, 1799, possession being taken, he did not see why it should be considered otherwise than as a sale. The transaction of 1799 was an absolute conveyance as to a purchaser, with a proviso for re-conveyance to the apparent vendor, upon payment of the purchase-money within two years. Subsequent instruments between the parties described the premises as standing upon mortgage, and upon that Sir W. Grant decreed a redemption*. Trying this case by the principle so long established, and settled upon such high authority, what is there to shew that this transaction was in its origin a mortgage, and not a sale under certain conditions for a re-purchase? *If the transaction was a mortgage, there must have been a debt;* but how could Owen have compelled payment? It appears also, that he, as a purchaser, paid for the conveyance, and was at all events to be at liberty to keep the rents. There was, indeed, the want of many circumstances, which in other cases have been thought necessary to give to a purchase the character of a mortgage, and no proof of any intention having existed that it should be so considered. In *Baker* v. *Wind*, 1 Ves. sen. 163, relied upon by the plaintiff, it was proved, that the parties had throughout treated the transaction as a mortgage, and had made it assume the appearance of a purchase, to deceive the creditors of the mortgagor. I am, for these reasons, and upon these authorities, of opinion, that the

Conditional purchases.

When there is a mortgage, there must be a debt.

* [Of course, a merely verbal admission that the premises are on mortgage, would not be sufficient, unless there were corroborative circumstances shewing fraud; for to admit such evidence, would be to infringe upon the Statute of Frauds. See *Perry* v. *Marston*, 2 Bro. C. C. 399; and see further as to evidence of the nature of the transaction, *Tull* v. *Owen*, 4 You. & C. 192.]

Verbal admission of right to redeem.

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produced, and subject to certain conditions of sale; copies of which plan, particulars, and conditions, signed by the said [*vendor*], are now in the possession of the said [*purchaser*]. But the said estate comprised in the said seven lots, particulars, and plan, was then and there purchased by [*agent*], in one lot, at the price of £1700, but subject to the said conditions of sale so far as the same were applicable to a sale in one lot. AND WHEREAS the said [*agent*] purchased the same as the agent and on behalf of the said [*vendor*]. AND WHEREAS the said [*purchaser*], at the request of the said [*vendor*], paid the sum of £300 to the solicitor for the vendors at the said sale, for the deposit and auction duty thereon. AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the purchase of all his interest in the said estate so sold as aforesaid, free from all incumbrances, (except the unpaid residue of the said

Recital of purchase at auction by agent.

—agreement for sale of benefit of contract.

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plaintiff had not established any title to redeem, or to enforce the contract for a re-purchase, and that the case attempted of fraud has wholly failed, and the bill ought to have been dismissed with costs."]

[It is singular, that Lord Cottenham in his judgment should have taken no notice of the cases of *Fulthorpe* v. *Foster*, 1 Vern. 476; *Manlove* v. *Bale*, 2 id. 84; and *Spurgeon* v. *Collier*, 2 Eden, 55; in which the principle which he has so clearly laid down was not regarded; but as the weight and number of the authorities in favour of his Lordship's doctrine considerably exceed those of the cases opposed to it, we may safely regard the law as finally settled on this point.]

Conditional sale in consideration of existing debt.

Perry v. *Meadowcroft.*

Conditional sale of the benefit of a contract.

[The mere circumstance that part of the consideration for the purchase consists of an existing debt due from the vendor to the purchaser will not necessarily convert the transaction into a mortgage, for even a mortgage itself may, where there is no undue pressure, be converted into a sale by a release of the debt. Thus, in *Perry* v. *Meadowcroft*, 4 Beav. 197, J. D. having made a very advantageous purchase of an estate at an auction, for 1435*l.*, borrowed 185*l.*, the amount of the auction duty and deposit from J. M., who afterwards advanced to him 600*l.* on account of the purchase, but which was otherwise applied, 1291*l.* of the purchase-money remaining unpaid. J. D. & J. M., in November 1820, entered into an agreement, that, in consideration of the advance of 600*l.*, and a further sum of 400*l.*, to be paid in two months, J. M. should be entitled to the benefit of the contract; but if J. D. should, on the 15th of July following, pay to J. M., the whole of the purchase-money of 1435*l.*, and also the advance of 1000*l.* with interest, the agreement should be void; if not then paid, the sale to J. M. was absolutely confirmed. J. D. was to have permission of making sales in the meantime, subject to the approval of J. M., commencing with lot 1, in rotation, so as to reimburse the purchase-money and advances made. There was no agreement by J. D. to pay the money or to repurchase the estate and the interest. Lord Langdale, M. R., held, that this was not a mortgage, and the decision was affirmed by Lord Lyndhurst, C.]

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purchase-money for the same), at the price of £500 (exclusive of the said sum of £300, so paid as aforesaid, which is to be considered as having been paid on behalf of the said [*purchaser*]), but subject to the proviso for repurchase in the event and upon the terms hereinafter-mentioned. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said contract, and in consideration of the sum of £500 sterling by the said [*purchaser*] to the said [*vendor*] paid immediately before the execution of these presents, (the receipt whereof is hereby acknowledged), the said [*vendor*] DOTH by these presents bargain, sell, assign, transfer, and set over to the said [*purchaser*] and his heirs, ALL the said estate, hereditaments, and premises comprised in the above-recited plan and particulars, and so purchased by or on the behalf of him, the said [*vendor*], as aforesaid; And all the right, title, trust, property, benefit, claim, and demand, whatsoever, both at law and in equity, which he the said [*vendor*] now hath or may have therein or thereto, or otherwise howsoever under or by virtue of the above-recited sale and contract; With all and every the incidents and appurtenants to the said premises, or any of them; Together with full power and authority to and for the said [*purchaser*], his heirs, executors, administrators, and assigns, and his and their substitute or substitutes, as the attorney or attorneys, and in the name or names of the said [*vendor*], his heirs, executors, or administrators, or otherwise howsoever, to make demands, and to commence, bring, prosecute, and carry on all lawful actions, suits, and other proceedings, either at law or in equity, upon, under, or by virtue of the above-recited contract or sale; and any such actions, suits, and proceedings to release, compromise, or discharge; and otherwise to act in the premises as fully and effectually as the said [*vendor*], his heirs, executors, or administrators might have done, if these presents had not been made. TO HAVE, HOLD, EXERCISE, AND ENJOY the said premises and powers intended to be hereby respectively assigned and conferred unto and by the said [*purchaser*], his heirs, executors, administrators, and assigns, for his or their own use and benefit, in as ample and beneficial a manner in all respects as the said [*vendor*], his heirs, executors, or administrators might have done, if these presents had not been made; Subject, nevertheless, to the payment by the said [*purchaser*], his executors or administrators, of the residue of the said purchase-money (with interest, in case interest shall become payable) to the vendors at the said sale, and

Testatum.

Vendor assigns benefit of contract.

Power of attorney.

Habendum.

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to the observance and performance by the said [*purchaser*], his heirs, executors, or administrators, of all the stipulations and agreements contained in the said conditions of sale on the purchaser's part to be observed and performed, and of all other the duties which a purchaser under such conditions ought to fulfil. And the said [*vendor*], for himself, his heirs, executors, and administrators, Doth hereby covenant with the said [*purchaser*], his heirs or assigns, that he the said [*vendor*] hath not, at any time heretofore, made, done, executed, or knowingly suffered or been party to, and is not now aware of, any act, deed, matter, or thing, by means whereof he is prevented from assigning the said estates and premises in manner aforesaid and according to the true intent and meaning of these presents, or by means whereof the said estates and premises so sold as aforesaid, or any part thereof, are, is, or may be aliened, charged, impeached, or prejudicially affected in any manner howsoever; *And further*, that he the said [*vendor*], his heirs, executors, and administrators, will and shall from time to time and at all times henceforth, until the said estates and premises so sold as aforesaid shall have been duly conveyed and assured unto the said [*purchaser*], his heirs and assigns, or as he or they shall direct, upon every reasonable request of the said [*purchaser*], his heirs, executors, administrators, or assigns, make, do, and execute every lawful deed, act, matter, and thing, for the better or more readily or effectually enabling the said [*purchaser*], his heirs, executors, administrators, or assigns, to obtain a specific performance of the said contract for sale, or otherwise to realise and enjoy the benefit of the assignment intended to be hereby made. [*And further*, that in case the said contract for sale so entered into with the said [*agent*] on behalf of the said [*vendor*], shall not be carried into effect by reason of such a defect of title or power in the vendors, or of such a misdescription in and by the said particulars and plan as would alone be a sufficient defence to a suit in equity by the said vendors seeking specific performance of the said contract, then, and in such case only, the said [*vendor*], his heirs, executors, or administrators, will or shall within three calendar months after demand thereof, in writing, made by the said [*purchaser*], his executors, administrators, or assigns, (such demand to be made within two calendar months from the time of the discovery of such defect or misdescription by the said [*purchaser*], his executors, administrators, or assigns), repay unto the said [*purchaser*], his

Covenant by vendor that he has not done any act, &c.;

—for further assurance;

—in case title proves defective, to repay consideration-money with interest.

executors, administrators, or assigns, the said sum of 500*l.*, with interest for the same, after the rate of 5*l.* per centum per annum, from the —— day of ——, and on such repayment shall be entitled to such benefit of the said contract for sale, and to such actions or suits thereon as he or they would have been entitled to, if these presents had not been made (*b*)]. AND the said [*purchaser*], for himself, his heirs, executors, and administrators, Doth hereby covenant with the said [*vendor*], his heirs, executors, and administrators, that he the said [*purchaser*], his heirs, executors, administrators, or assigns, will or shall from henceforth duly observe, perform, and fulfil all the stipulations and agreements contained in the said conditions of sale, on the purchaser's part to be observed and performed, and all other the duties which a purchaser under such conditions ought to fulfil; *And* will or shall, at all times henceforth, effectually keep harmless and indemnified the said [*vendor*], his heirs, executors, and administrators, of, from, and against the same stipulations, agreements, and duties, and all actions, suits, costs, charges, damages, expenses, claims, and demands, whatsoever, for or in respect of the same stipulations, agreements, and duties, or any of them, or any breach or neglect thereof respectively, or for or in respect of the power or authority hereinbefore given to the said [*purchaser*], his heirs, executors or administrators, or any action, suit, or other proceeding at law or in equity which may be brought or instituted by the said [*purchaser*], his executors, administrators, or his or their substitute or substitutes, by virtue thereof or otherwise in relation thereto. PROVIDED ALWAYS, and it is hereby agreed and declared, that in case the said [*vendor*], his heirs, executors, administrators, or assigns, shall, on or before the —— day of ——, now next ensuing, pay unto the said [*purchaser*], his heirs or assigns, the sum of 650*l.* (*c*), then and in that case, but not otherwise, the assignment hereby made shall be void to all intents and purposes, and on payment by the said [*vendor*], his heirs,

96. CONDITIONAL ASSIGNMENT OF BENEFIT OF CONTRACT FOR PURCHASE.

Purchaser covenants to perform original contract and indemnify vendor.

Proviso for repurchase.

(*b*) [A stipulation of this kind should be well considered, and framed with great caution.]

(*c*) [It is quite immaterial whether this sum exceeds the amount of the purchase-money with lawful interest or not. Being no debt, there can be no usury. *Beete* v. *Bedgood*, 7 B. & Cr. 453: ante, Vol. 3, p. 398.] Rate of interest.

96. CONDITIONAL ASSIGNMENT OF BENEFIT OF CONTRACT FOR PURCHASE.

executors, administrators, or assigns, to the said [*purchaser*], his heirs, executors, administrators, or assigns, of all and every the costs, charges, and expenses, which he or they shall have expended, incurred, or been put to, in and about the premises, the said estate and premises intended to be hereby assigned shall be forthwith re-assigned or re-assured unto the said [*vendor*] and his heirs, or otherwise, as the said [*vendor*], his heirs, executors, administrators, or assigns, shall direct, and at his or their expense. AND the said [*vendor*] Doth hereby declare and direct, that, in case of his death before the —— day of ——, his heir or heirs shall not be entitled to require the said sum of 650*l.*, or other the expenses of or incident to such repurchase as aforesaid, to be raised out of his personal estate; but in case such repurchase shall be made by his executors or administrators, his heir or heirs shall have the option of purchasing the said estates and premises from them, on repayment to them of the said sum of 650*l.*, and all other the expenses of and incident to such repurchase, with lawful interest. But such option shall be declared by such his heir or heirs in writing, on or before the —— day of ——, which will be in the year ——. IN WITNESS &c. (*d*).]

Declaration that vendor's heir shall not require re-purchase-money to be paid by his executors.

Stamp.

(*d*) [This deed will require an ad valorem stamp on the consideration money paid to the present vendor.]

97. ASSIGNMENT OF LAND-TAX, OR GRANT OF FEE-FARM-RENT IN LIEU OF LAND-TAX.

97. [ASSIGNMENT *of* LAND-TAX REDEEMED *under the stat.* 38 *Geo.* 3, *c.* 60. *Variation where the* GRANT *is of a* FEE-FARM RENT *in lieu of Land-Tax* PURCHASED *under the stat.* 42 *Geo.* 3, *c.* 116.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part, and [*purchaser*], of &c., of the other part. WHEREAS, by a certificate of contract, bearing date the —— day of ——, 1799, under the hands and seals of Henry Bunn and Peter Brindley, Esq., two of the commissioners for the purposes of an act intituled, "An Act for making perpetual, subject to redemption and purchase in the manner therein stated, the several sums of

Recital of certificate of contract for redemption of land-tax;

97. ASSIGNMENT OF LAND-TAX, OR GRANT OF FEE-FARM RENT IN LIEU OF LAND-TAX.

money now charged in Great Britain as a land-tax for one year from the 25th day of March, 1798" (*a*), for the county

(*a*) [The recital will, of course, be varied to suit the form of the certificate: thus, where the premises were in the city of London, the certificate went on thus:—

Variations.

" and also three other acts of Parliament for explaining and amending the above-recited act for the city of London, and liberty of St. Martin le Grand."

[In certificates of contracts for redemption made subsequently to the 53 Geo. 3, c. 123, the commissioners are styled:—

" Two of the commissioners acting in the execution of the several acts for the redemption of the land-tax."

[Where the subject of conveyance is a fee-farm rent, purchased under the stat. 42 Geo. 3, c. 116, the recital will run thus:—

Recital of certificate of contract for purchase of rent in lieu of land-tax.

" WHEREAS, by a certificate of contract under the hands and seals of [*commissioners*], two of the commissioners appointed for the purposes of an act intituled, 'An Act for consolidating the provisions of the several acts passed for the redemption and sale of the land-tax into one act, and also for removing doubts respecting the right of persons claiming to vote at elections for knights of the shire, and other members to serve in Parliament, in respect to messuages, lands, or tenements, the land-tax upon which shall have been redeemed,' [*or, more concisely,* two of the commissioners acting in execution of the several acts for the redemption and sale of the land-tax,] for the —— of ——, the said commissioners certified that they had contracted and agreed with [*original purchaser*] for the sale to him of £—— land-tax as a fee-farm rent, being the land-tax charged upon [*description from the certificate of amount*]. And which premises were assessed in the assessment made for the —— of ——, for the year ——, as follows, videlicet, [*extract from the assessment*]. And the consideration was declared to be &c. And the said commissioners did, by their certificate now being recited, order and direct that the whole of the said sum of £—— should in future be paid and borne as a fee-farm rent out of such parts only of the before-mentioned premises as were thereinafter described, videlicet, [*premises charged*]. Which certificate of contract was duly registered" &c.

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of Surrey; the said commissioners certified that they had contracted with [*former owner*], of &c., for the redemption by him of £—— land-tax, being the land-tax charged upon dwelling-houses and tenements, situate in —— street, in the parish of ——, in the county of Surrey, the property of the said [*former owner*], in the tenure and occupation of the several persons therein named, and severally and respectively rated in the land-tax assessment for the said parish of ——, for the year 1798, in manner following, videlicet: one messuage, with the appurtenances, then in the occupation of ——, charged with 1*l.* 18*s.* 9*d.*; one messuage &c., (*or transcribe the extract from the assessment in columns*). And it was, by the certificate now being recited, declared that the consideration for the said redemption was £——, capital stock in the Consolidated 3*l.* per centum Bank Annuities, or Reduced 3*l.* per centum Bank Annuities, to be transferred to the commissioners for the redemption of the national debt at

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[Where brevity is desired, the following short recital may be used:—

Short recital of redemption of land-tax.

"WHEREAS, by a certificate of contract under the hands and seals of [*commissioners*], (two of the commissioners acting under the several acts for the redemption of the land-tax), dated the —— day of ——, and registered on the —— day of ——, the sum of £—— land-tax, being the land-tax charged upon the hereditaments hereinafter mentioned in the proportions following, namely, (*transcribe the extract from the assessment*), was redeemed by [*former owner*]. AND WHEREAS, by an indenture made the —— day of ——, between &c., the said £—— land-tax was assigned to the said [*vendor*], his executors, administrators, and assigns, thenceforth for ever."]

[A contract for the purchase of a fee-farm rent may be thus recited:—

Short recital of purchase of rent in lieu of land-tax.

"WHEREAS, by a certificate of contract under the hands and seals of [*commissioners*], (two of the commissioners acting under the several acts for the redemption and sale of the land-tax), dated &c., and registered &c., the fee-farm rent of £——, to be paid in lieu of land-tax out of (*premises charged*), was sold to [*original purchaser*], his heirs and assigns, for ever. AND WHEREAS, by an indenture made &c., the said fee-farm rent of £—— was granted unto and to the use of the said [*vendor*], his heirs and assigns, for ever."]

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the Bank of England [in one sum on or before the —— day of ——, *or*] with interest, in the proportions and at the times therein mentioned. Which certificate of contract was duly registered, on the —— day of —— following, at the land-tax office. And on the —— day of —— [the said sum of £—— 3*l.* per centum Consolidated Bank Annuities, *or*] the last instalment of the said sum of £—— 3*l.* per centum &c. was accordingly transferred to the said commissioners for the redemption of the national debt, as appears by a certificate or receipt indorsed upon the said certificate of contract. AND WHEREAS by virtue of various assurances and acts in the law, and ultimately by an indenture dated &c. and made &c. (*b*), *All that* and those the aforesaid land-tax or several yearly sums of 1*l.* 18*s.* 9*d.* &c., amounting together to £——, so redeemed and purchased by the said [*former owner*], as mentioned and specified in the said certificate of contract, and all future payments of the said several sums respectively, were assigned unto the said [*vendor*], his [heirs] (*c*), executors, administrators, and assigns, for ever. AND WHEREAS the said [*vendor*] hath, since the date of the said indenture, been in the possession or receipt of the said (*d*) redeemed land-tax or several yearly sums, and the same have been paid to or received by him up to and inclusive of the 24th day of June now last past. AND WHEREAS the said [*vendor*] hath contracted with the said [*purchaser*] for the absolute sale to him of the

—of mesne assignments, and ultimate assignment to the vendor;

—of enjoyment by vendor, and contract for sale.

(*b*) "*All that* the aforesaid fee-farm rent of £—— so purchased by the said &c., and all future payments thereof, were granted and assured unto the said [*vendor*], his heirs and assigns, for ever."

Fee-farm rent.

(*c*) [Many assignments of redeemed land-tax, with the limitation in this form, are to be met with, the framers of them having apparently been in doubt as to the course in which the property would devolve. Land-tax redeemed under the stat. 38 Geo. 3, c. 60, goes to the personal representatives: a fee-farm rent, purchased under the stat. 42 Geo. 3, c. 116, goes to the heirs. But where a tenant for life, or for any other particular interest, redeems the land-tax out of his own pocket, the charge to which he is entitled under that act is personal estate (s. 123), and, without some evidence of intention, will not merge upon his becoming entitled to the fee-simple. *Trevor* v. *Trevor*, 2 Myl. & K. 675. See *Weld* v. *Tew*, Beatt. 275; *Ex parte Phillips*, 19 Ves. 118; *Ex parte Sparkes*, M'Clel. 518.]

Devolution of purchased land-tax and fee-farm rent respectively.

(*d*) "fee-farm rent, and the same has been" &c.

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said (*e*) land-tax or several sums at or for the price of £——. NOW THIS INDENTURE WITNESSETH, that in consideration of £—— (*f*) of lawful British money in hand paid by the said [*purchaser*] to the said [*vendor*] at or immediately before the execution of these presents, the receipt whereof is hereby acknowledged, the said [*vendor*]

Testatum.

Vendor assigns land-tax.

DOTH by these presents absolutely (*g*) bargain, sell, assign, transfer, and set over unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT OR THOSE the said land-tax or several yearly sums of 1*l.* 18*s.* 9*d.* &c., amounting together to the yearly land-tax or sum of £—— so as aforesaid redeemed and purchased by the said [*former owner*], and charged upon and issuing and payable out of the said several hereditaments mentioned in the above-recited certificate of contract, as and for the land-tax thereon; And all future and growing yearly and other payments of the said land-tax and several yearly sums respectively; Together with the aforesaid certificate of contract, and all benefit and advantage thereof, and also all powers, remedies, and means of and for recovering, receiving, and compelling payment of the same (*e*) land-tax or several yearly sums respectively; And all the estate, right, title, interest, property, benefit, claim, and demand, whatsoever of the said [*vendor*], in, to, or in respect of the same (*e*) land-tax, yearly sums, and premises. TO HAVE, HOLD, RECEIVE, TAKE, AND ENJOY the said (*e*) land-tax, yearly sums, and premises (*h*) unto

Habendum.

(*e*) "yearly fee-farm rent"

Stamp.

(*f*) [The deed will require the usual ad valorem stamp. The exemption in the stat. 42 Geo. 3, c. 116, s. 173, only applies to assignments for special purposes under the provisions of the land-tax acts. See 45 Geo. 3, c. 77; 55 Geo. 3, c. 184, Sched. part 1, "LAND-TAX."]

Grant of fee-farm-rent.

(*g*) "grant, bargain, sell, and confirm unto the said [*purchaser*] and his heirs ALL THAT the said yearly fee-farm rent or sum of £—— so as aforesaid purchased by the said [*original purchaser*], and issuing and henceforth to be paid and borne out of the said several hereditaments mentioned in the above-recited certificate of contract; And all future and growing yearly and other payments of the said fee-farm rent or sum; Together with" &c.

(*h*) "*Unto and To the Use of* the said [*purchaser*], his

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the said [*purchaser*], his executors, administrators, and assigns, henceforth absolutely for ever. And the said [*vendor*] Doth hereby for himself, his heirs, executors, and administrators, covenant with the said [*purchaser*] (*i*), his executors, administrators, and assigns, that, notwithstanding any act, deed, default, or other matter or thing by him the said [*vendor*] made, done, or committed, or willingly permitted or suffered, or to which he hath been party or privy, [he the said [*vendor*] is now rightfully and absolutely (*k*) possessed of or entitled to the said land-tax or several yearly sums and premises expressed to be hereby assigned or otherwise assured, for his own use and benefit; *And* that, notwithstanding any such act, deed, matter, or thing as aforesaid], he the said [*vendor*] now hath in himself good right and authority to (*l*) assign or assure the said land-tax or several yearly sums and premises unto the said [*purchaser*], his executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents: *And further*, that it shall and may be lawful for the said [*purchaser*], his (*m*) executors, administrators, and assigns, from time to time and at all times hereafter peaceably and quietly to have, hold, receive, take, and enjoy the said (*n*) land-tax or several yearly sums and premises for his and their own absolute use and benefit, without any let, suit, denial, eviction, or interruption whatsoever of, from, or by the said [*vendor*] or his (*o*) executors or administrators, or any other person or persons lawfully claiming or to claim by, from, through, under, or in trust

Covenants by vendor, that he is well entitled;

—and has right to assign;

—for quiet enjoyment;

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heirs and assigns, henceforth absolutely for ever. (*Or, to uses to prevent dower, ut ante, p.* 73, *varying the covenants accordingly*).

(*i*) "and his heirs,"

(*k*) "seised of or entitled to the said yearly fee-farm rent and premises expressed to be hereby granted or" &c.

(*l*) "grant or assure the said yearly fee-farm rent and premises unto and to the use of the said [*purchaser*], his heirs and assigns,"

(*m*) "heirs and assigns,"

(*n*) "yearly fee-farm rent and premises"

(*o*) "heirs, or any other person" &c.

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for him; *And that* free and clear, and freely, clearly, and absolutely acquitted and discharged, or otherwise, by and at the expense of the said [*vendor*], his heirs, executors, or administrators, well and sufficiently kept harmless and indemnified from and against all estates, rights, titles, troubles, charges, and incumbrances, whatsoever, created done, executed, or suffered by the said [*vendor*], or any person or persons lawfully claiming or to claim by, from, through, under, or in trust for him: *And moreover*, that he the said [*vendor*] (*p*), his executors and administrators, and all and every other person and persons having, or to have, or lawfully or equitably claiming or to claim, any estate, right, title, trust, or interest in, to, or out of the said (*q*) land-tax or several yearly sums and premises, or any of them, or any part thereof respectively, will and shall from time to time and at all times hereafter, upon every reasonable request, and at the costs of the said [*purchaser*], his heirs, executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all such further and other lawful acts, deeds (*r*), assignments, assurances, matters, and things, in the law whatsoever, for further, better, more perfectly, and absolutely or satisfactorily (*s*) assigning or assuring the said (*q*) land-tax or several yearly sums and premises, or any part thereof, unto (*t*) the said [*purchaser*], his executors, administrators, and assigns for ever, or for more fully and effectually empowering and enabling him and them to recover and receive the same (*q*) land-tax or several yearly sums and premises, or otherwise, as he or they or any of them shall direct or appoint, as by the said [*purchaser*], his (*u*) executors, administrators, or assigns, or his or their counsel in the law shall be advised and required (*x*). IN WITNESS &c.]

—free from incumbrances;

—and for further assurance.

(*p*) "and his heirs, and all" &c.

(*q*) "yearly fee-farm rent and premises,"

(*r*) "grants,"

(*s*) "granting,"

(*t*) "and to the use of the said [*purchaser*], his heirs and assigns"

(*u*) "heirs or assigns,"

Land-tax.

(*x*) The present land-tax originated in the reign of William the Third*,

* [The first land-tax act appears to have been passed in the reign of

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and was one of the imposts which were created (in substitution for the more arbitrary and unconstitutional exactions of his predecessors), for the purpose of enabling this monarch to carry on the war against France. It was first enacted for a year only, and, in consequence of the jealousy of Parliament, continued to be annual until the year 1798, when Mr. Pitt introduced his well-known measure for rendering the land-tax perpetual, subject to redemption. The tax now subsists under the stat. 38 Geo. 3, c. 5, which was the act in force when the perpetuating stat. 38 Geo. 3, c. 60, was passed, and which, after assessing the counties, cities, and some other local districts in England and Wales, in certain sums, enacts, "That all and every manors, messuages, lands, and tenements, and also all quarries, mines of coal, tin, and lead, copper, mundic, iron, and other mines; iron mills, furnaces, and other iron works; salt springs, and salt works; all alum mines and works; all parks, chases, warrens, woods, underwoods, coppices; and all fishings, tithes, tolls, annuities, and all other yearly profits; and all hereditaments, of what nature or kind soever they be, situate, lying, and being, happening, or arising, within the several and respective counties, cities, boroughs, towns, or places aforesaid, respectively, or within any parts of the same, as well within antient demesne, and other liberties and privileged places, as without, within that part of Great Britain called England, Wales, or Berwick, as aforesaid; and all and every person and persons, bodies politic and corporate, guilds, mysteries, fraternities, and brotherhoods, whether corporate or not corporate, having or holding any such manors, &c. in respect thereof; shall be charged with as much equality and indifference as is possible, by a pound rate, for or towards the said several and respective sums by this act set or imposed, or intended to be set and imposed, for and upon all and every such counties, &c., hereby charged therewith as aforesaid."

Land-tax.

Stat. 38 Geo. 3, c. 5.

Lands, tenements, mines, &c.,

to be charged with land-tax.

Sect. 5. "And whereas many of the manors, messuages, lands, tenements, tithes, hereditaments, and premises, in England, &c., intended by this act to be charged with a pound-rate as aforesaid, stand incumbered with, or are subject or liable to the payment of, several rent-charges, or annuities, or other annual payments, issuing out of the same, or to the payment of divers fee-farm rents, rents-service, or other rents thereupon reserved or charged, by reason whereof the true owners and proprietors of such manors, &c. do not in truth receive to their own use the true yearly value of the same, for which nevertheless they are by this act chargeable with a certain pound-rate; it is therefore declared and enacted by the authority aforesaid, that it shall and may be lawful to and for the landlords, owners, and proprietors of such manors, &c., in England, Wales, and Berwick-upon-Tweed, being charged with a pound-rate as aforesaid, to abate and deduct, and to detain and keep in his, her, or their hands, out of every such fee-farm rent, or other annual rent or payment, so much of the said pound-rate, which shall be taxed or assessed upon the said manors, &c., as a like rate for every such fee-farm rent, or any other annual rent or payment respectively,

Rents, charges, annuities, &c., to be rated.

Charles II., (22 & 23 Car. 2, c. 3), but previously to the passing of the stat. 4 Will. & M. c. 1, the expedient was only resorted to on extraordinary occasions.]

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shall by a just proportion amount unto, so as such fee-farm rent, or other annual rent or payment respectively, do amount to twenty shillings per annum or more; and all and every person or persons, who are or shall be anyways entitled to such rents or annual payments, their respective auditors, reeves, receivers, and their deputy or deputies, are hereby required to allow such deductions and payments, according to such rates, upon receipt of the residue of such monies as shall be due and payable to them for such rents or annual payments reserved or charged as aforesaid, without any fee or charge for such allowance *."

[The first general redemption act was the 38 Geo. 3, c. 60 †, which

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As to the liability of owners of fee-farm rents to contribute to the land-tax.

* The adjustment of the proportions of the land-tax between the owner of land, and of a fee-farm rent issuing out of it, must, it is obvious, be a source of frequent dispute. By stat. 38 Geo. 3, c. 60, s. 16, and 42 Geo. 3, c. 116, s. 35, therefore, power is given to the commissioners to adjust these proportions. Another question which sometimes arises is, whether the person creating the charge intended the donee to take it exempt from any deduction on account of land-tax. Upon this point, it has been held, that where A. granted a fee-farm rent to B., "without any deduction, defalcation, or abatement, for or in any respect whatsoever," the grantee was not liable to land-tax, under stat. 4 W. & M. c. 1, the provisions of which are transcribed into the subsequent acts. *Bradbury* v. *Wright*, Doug. 624.

As to rents created subsequently to the passing of the act.

It will be observed, that the clause supra applies only to lands, &c., which "stand" incumbered with, or "are" subject to, the payment of rents, &c., and these words, it should seem, would not extend to rents, which were not in esse at the passing of the act; and as the subsequent act of 38 Geo. 3, c. 60, only renders perpetual the duty which was then payable under the existing act, it cannot, it is conceived, have the operation of extending the provision in question to rents subsequently created. The editor, however, distrusts his impressions upon this point, because in practice it has been invariably considered, that the clause in question does apply to such rents; and this undoubtedly was the intention of the framers of the act, or rather would have been their intention, if the point had been presented to their notice. Unless, however, some passage can be shewn in the subsequent acts, which has the effect of charging fee-farm rents subsequently created, there is strong ground to contend that no land-owner can claim a reduction in respect of any rent-charge not in existence when the act of 38 Geo. 3, c. 5, was passed; and even if the general terms of the 4th sect. might otherwise be construed as extending to fee-farm rents, the 5th section, which is expressly applicable to them, would afford an argument against that construction. The point is of less importance than it would otherwise be, because generally the terms used in creating a rent-charge would exempt it from its liability to contribute to the land-tax.

As to stat. 38 Geo. 3, c. 60.

† As much land-tax was redeemed under this act, it is often necessary, in the examination of titles, to have recourse to it, to ascertain the sufficiency of contracts for redemption. One respect in which this act materially differed from the present was, that land-tax purchased under it continued to be payable to the Receiver-General as before, and was paid by him to the purchaser, to whose representatives it went as personal

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was repealed by the 42 Geo. 3, c. 116, the provisions of which act are for the most part in force at this day. The subsequent acts are, 43 Geo. 3, c. 51; 45 Geo. 3, c. 77; 46 Geo. 3, c. 133; 50 Geo. 3, c. 58; 53 Geo. 3, c. 123; 54 Geo. 3, c. 73; and 57 Geo. 3, c. 100.]

[Under the land-tax redemption acts, power is given to the owners of lands charged, and, under certain regulations, to the owners of partial interests in the lands, guardians, &c., to contract for the absolute redemption of the land-tax. Another set of provisions (42 Geo. 3, c. 116, s. 154, see sect. 20) allows of the purchase of the land-tax by strangers to the land charged. Persons desirous of purchasing land-tax are to produce to the commissioners of land-tax for the district a *statement* in writing of the tax proposed to be purchased, and of the manors, &c. for which it is charged. The commissioners are thereupon to ascertain the amount of the land-tax, and to grant to the applicant a *certificate*, in a prescribed form, containing the description of the manors, &c., names of proprietors, and the amounts of the several assessments. On producing this certificate to the commissioners, and (where the land-tax shall exceed £25) on giving them notice in writing whether the consideration is proposed to be paid in stock or in money, and if in money by what instalments, and when, the commissioners are to amend the certificate if necessary, and to cause *notice* of the offer to be affixed to the church-door of the parish, &c. at least fourteen days before entering into any contract. If no other offer exceeding such offer by at least one per cent. is made within the fourteen days, it shall be lawful for the commissioners to *contract* and agree with the person first offering; and, if a better offer is made, to contract with the highest bidder (see *Williams* v. *Steward*, 3 Meriv. 472) for the sale. The commissioners to cause to be inserted in every such *contract* the description of the manors, &c., and the particulars required to be inserted in the certificate. Upon the production of such *contract* at the Bank of England, where the consideration is stock, and upon the transfer to the commissioners for the reduction of the national debt, of the stock or of the first instalment thereof, being not less than one fourth part of the whole; and where the consideration is money, upon the production of such contract to the Receiver-General for the county, &c., and payment to him or his deputy of the money, the purchaser shall be entitled to a certificate or receipt from the cashier of the Bank or the Receiver-General, in a prescribed form; and upon the registry (sect. 164) of such *contract*, the manors, &c., the land-tax whereof shall be so purchased, shall be wholly freed and exonerated from such land-tax, "from the like periods as are herein directed in cases of redemption of land-tax. But the respective purchasers of such land-tax, *and their heirs, successors, and assigns*, shall, from such period of exoneration, be entitled to demand, have, and receive for their, his, or her own use, for ever, and shall, by virtue of this act, be adjudged, deemed, and taken to be in the actual seisin and possession of a yearly

Redemption and purchase of land-tax.

42 Geo. 3, c. 116, s. 154.

Statement.

Certificate.

Notice.

Contract.

Receipt.

Registry of contract.

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estate, whereas it will be seen that, under the present act, (sect. 154), a person purchasing the land-tax is entitled to a fee-farm rent out of the lands, equal to the amount of the land-tax, and which devolves upon his representatives as *real* estate.

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rent or sum as a *fee-farm rent*, equal in amount to the land-tax so purchased by him, her, or them, free of all charges and deductions whatever, to be issuing and payable out of the manors, &c., whereon the land-tax so purchased was charged, on the same days as such land-tax was payable at the time of the purchase thereof. And such respective purchasers, their heirs, successors, and assigns, shall have priority of security on such manors, &c., in respect of such annual sum or rent, over every other incumbrance thereon; and shall have and enjoy all such powers, remedies, benefits, and advantages, for the recovery thereof, whether by action, suit, distress, or otherwise, as landlords by law have or can enjoy for the recovery of rents reserved on leases." The act gives two forms of certificates; the first is a certificate of the *amount* of the land-tax, being the *certificate* mentioned in the section abstracted above; and the other is termed, in the schedule, a "certificate of the contract for the purchase of land-tax as a fee-farm rent," being, therefore, what in the body of the act is called the *contract*. See 3 Meriv. 498.]

Certificate.

Contract.

Appropriation of charge on specific lands.

[By sect. 155, at the desire of the person beneficially interested in the lands, the commissioners may order the whole fee-farm rent to be paid out of any part of the lands, being equal in annual value to three times the rent.]

Copies of contracts.

[By sect. 165, copies of registered contracts, signed by the registering officer, are declared to be good evidence of the contract.]

Rent-charge is a parliamentary tax.

[The rent-charge in lieu of the land-tax is included as a parliamentary tax in a covenant by a lessor to pay "all parliamentary, parochial, and other taxes, tithes, and assessments." *Christ's Hospital* v. *Harrild*, 3 Scott, N. R. 126. See *Baker* v. *Grecnhill*, 2 Gale & D. 435.]

Qualification to vote at election.

[By the stat. 2 & 3 Will. 4, c. 45, s. 22, it is enacted, that, to entitle any person to vote in an election of a member of Parliament in respect of any messuages, lands, or tenements, whether freehold or otherwise, it shall not be necessary that the same shall be assessed to the land-tax. As to the boroughs of New Shoreham, Cricklade, Aylesbury, and East Retford, see stat. 6 & 7 Vict. c. 18, s. 77. By sect. 72 of the same act, the stat. 3 Geo. 3, c. 24, requiring the registration of annuities and rent-charges relied on as qualifications to vote for members of Parliament is repealed. The rent-charges continue to be a qualification as they were before the passing of the Reform Act. 2 & 3 Will. 4, c. 45. See sect. 75.]

98. [FEOFFMENT *by a* MUNICIPAL CORPORATION *to a Purchaser.*

98. FEOFFMENT BY CORPORATION.

THIS INDENTURE, made the —— day of ——, BETWEEN the mayor, aldermen, and citizens, [*or*, burgesses (*a*)] of the city [*or* borough] of T., in the county of ——, of the first part [*treasurer*], of &c., (the treasurer of the said city) of the second part; [*commissioners*] (three of the lords commissioners of her Majesty's treasury) of the third part; [*purchaser*] of &c., of the fourth part; [*dower trustee*] of the fifth part; and [*attorney to deliver seisin*] of &c., of the sixth part. WHEREAS (*b*) the council of the said city of T., deeming it

Parties.

Recital of reso-

(*a*) [The style of all boroughs within the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, is declared to be "The mayor, aldermen, and burgesses of such borough;" (s. 6), and of all cities within the act, "The mayor, aldermen, and citizens of such city," Id. and s. 142.]

Style of municipal corporations.

(*b*) [By stat. 5 & 6 Will. 4, c. 76, s. 96, municipal corporations, within the act, are restrained from alienating any of the corporation lands, tenements, or hereditaments, or leasing them, (except upon building leases, sect. 96, 6 & 7 Will. 4, c. 104, s. 2), for a longer term than thirty-nine years, or in consideration of a fine: "Provided nevertheless, that in every case in which such council shall deem it expedient to sell and alienate, or to demise and lease, for a longer term than thirty-one years or upon different terms and conditions than those hereinbefore mentioned, any of the said lands &c., it shall be lawful for such council to represent the circumstances of the case to the lords commissioners of his Majesty's treasury; and it shall be lawful for such council, with the approbation of the said lords commissioners, or any three of them, to sell, alienate, and demise, any of the lands &c. of the said body corporate in such manner, and on such terms and conditions, as shall have been approved by the said lords commissioners. Provided always, that notice of the intention of the council to make such application as aforesaid shall be fixed to the outer door of the Town Hall, or in some public and conspicuous place within the borough, one calendar month at least before such application, and a copy of the memorial intended to be sent to the said lords commissioners shall be kept in the town-clerk's office during such calendar month, and shall be freely open to the inspection of every burgess at all reasonable hours during the same." By 6 & 7 Will. 4, c. 104, s. 2, it is declared, that the power of disposition, allowed by the above act to be exercised with the consent of the lords commissioners of the treasury, shall extend to dispositions, whether by way of absolute sale, or by way of exchange, mortgage, or charge, demise, or lease, and to every other disposition of the same whatsoever, which shall be so approved of as aforesaid."]

Stat. 5 & 6 Will. 4, c. 76, s. 96.

Lands belonging to municipal corporations how to be let or sold.

6 & 7 Will. 4, c. 104, s. 2.

98. FEOFFMENT BY CORPORATION.

lution of town council to sell, and memorial to the Lords Commissioners;

expedient to sell the hereditaments hereinafter described, (whereof the corporation of the said city was then and now is seised for an absolute and indefeasible estate in fee-simple in possession free from incumbrances), for the purpose of raising a fund for the making of certain embankments within the said city, did, (in pursuance of a resolution in that behalf made and passed and entered in the minute book of the said council at a meeting of the said council duly held in pursuance of notice; at which meeting not less than one-third part in number of the whole council of the said city was present, and [*mayor*], the mayor of the said city, presided and then and there signed the said entry of the said resolution), by memorial, represent the circumstances of the said case to the Lords Commissioners of her Majesty's Treasury, and apply to the said Lords Commissioners to approve of a sale of certain hereditaments belonging to the said corporation and specified in the said memorial, and including with other hereditaments the hereditaments hereinafter described. AND WHEREAS due notice of the intention of the said council to make such application as aforesaid was fixed to the outer door of the town hall of the said city one calendar month before the making of such application, and a copy of the memorial intended to be sent to the said Lords Commissioners, and so sent as aforesaid, was kept in the town clerk's office during such calendar month, and was freely open to the inspection of every citizen (*or*, burgess) at all reasonable hours during the same month. AND WHEREAS the said council did on the —— day of ——, with the approbation of the said Lords Commissioners, parties hereto, (testified by their execution of these presents) (*sale by auction, ut ante, p.* 278). NOW THIS INDENTURE WITNESSETH, that, in consideration of £—— sterling by the said [*purchaser*] to the said [*treasurer*], as such treasurer, in hand paid at or before the execution of these presents, (the receipt whereof the said [*treasurer*] doth hereby acknowledge, and from which sum of £—— the said [*treasurer*] and also the said mayor, aldermen, and citizens do hereby respectively acquit, release, and discharge the said [*purchaser*], his heirs and assigns for ever), the said mayor, aldermen, and citizens, with the approbation of the said Lords Commissioners, parties hereto, testified as aforesaid, Do (*c*) by these presents grant, sell, alienate, enfeoff,

—of sale.

Testatum.

In consideration of £—— paid to treasurer,

the mayor, &c., enfeoff the purchaser.

(*c*) [The use of the words of conveyance in the past tense originated

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and confirm unto the said [*purchaser*] and his heirs ALL (*parcels and general words*), and all the estate, right, title, possession, interest, property, claim, and demand, whatsoever, both at law and in equity, of the said mayor, aldermen, and citizens, in, to, or upon the said hereditaments and premises, and every or any part thereof. TO HAVE AND TO HOLD the said hereditaments and premises unto the said [*purchaser*] and his heirs (*to uses to prevent dower, ut ante, p.* 73). AND the said mayor, aldermen, and citizens, for themselves and their successors, do hereby covenant and agree with the said [*purchaser*] and his heirs, that (notwithstanding any act, deed, matter, or thing by them the said mayor, aldermen, and citizens, or their predecessors, made, done, permitted, or suffered to the contrary, they the said mayor, &c. (*covenants for title, &c. ut ante, p.* 165). AND the said mayor, aldermen, and citizens do hereby constitute and appoint the said [*attorney*] the lawful attorney for them the said mayor, aldermen, and citizens, and in their name and stead forthwith or at any time hereafter to enter into and upon and take possession and seisin of the said hereditaments and premises, or of some part thereof in the name of the whole, and then to deliver seisin of all the said hereditaments and premises, or of some part thereof in the name of the whole, unto the said [*purchaser*] or his attorney, lawfully authorized, according to the form and intent of these presents. AND the said [*purchaser*] doth hereby constitute and appoint the said [*dower trustee*], the lawful attorney for him the said [*purchaser*], and in his name and stead, to enter into and upon the said hereditaments and premises, or some part thereof in the name of the whole, and of and from the said mayor, aldermen, citizens, or their attorney, and for and in the name and stead of the said [*purchaser*], to receive and take possession and seisin of the said hereditaments and premises, or of some part thereof in the name of the whole, according to the form and intent of these presents. IN WITNESS &c. (*Memorandum of livery of seisin indorsed, ut ante, Vol.* 4, *p.* 65) (*d*).]

Habendum.

Covenants for title.

Appointment of attornies to deliver and receive seisin.

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with charters of feoffment, and is sometimes proper in them; but where the deed contemplates a future livery of seisin, and contains a power of attorney for that purpose, these words are as absurd as in a modern conveyance by bargain and sale, or release.]

As to words of conveyance in the past tense.

(*d*) [As to the stamps, vide ante, Vol. 4, p. 57.]

Stamps.

99. BOND DEBT.

99. ASSIGNMENT *of a* BOND-DEBT.

Parties. THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part.

Recital of bond; WHEREAS, by a certain bond or obligation, bearing date on or about the —— day of —— last, under the hand and seal of [*obligor*], of &c., the said [*obligor*] became bound unto the said [*vendor*] in the penal sum of £——, conditioned for the payment unto the said [*vendor*], his executors or administrators, of the sum of £——, and interest thereon, at the rate of 5*l.* per centum per annum, from the day of the date thereof, on the ——

—of debt being due; day of ——, then and now next ensuing. AND WHEREAS the said principal sum of £—— remains owing to the said [*vendor*], together with interest thereon from the —— day

—of contract for purchase. of ——. AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the said bond-debt, at the price or sum of £——.

Testatum. NOW THIS INDENTURE WITNESSETH, that, in pursuance

In consideration of purchase-money, vendor assigns to purchaser, of the said agreement, and in consideration of the sum of £—— sterling, paid by the said [*purchaser*] to the said [*vendor*], at or immediately before the execution of these presents, the receipt whereof the said [*vendor*] doth hereby acknowledge, and from the same doth absolutely discharge the said [*vendor*], his heirs, executors, and administrators, he the said [*vendor*] *Doth*, by these presents, assign, and

Bond, &c. transfer unto the said [*purchaser*], *All that* the hereinbefore-recited bond or obligation, and the full and whole force, benefit, and effect thereof, and of all other securities for the said debt; And all and every sums and sum of money now due, or hereafter to become due, either for principal or interest, by virtue or in respect of the same bond or obligation;

All the right, &c. And all the right, title, interest, claim, and demand, both at law and in equity, of the said [*vendor*], in or to the same bond or obligation, and other securities and sums and sum

Habendum. of money respectively. TO HAVE AND RECEIVE the said bond or obligation, sums and sum of money, and other the premises hereby assigned, or intended so to be, unto the said [*purchaser*], his executors or administrators, to and for his

99. BOND DEBT.

and their own use absolutely: *And* the said [*vendor*] doth hereby absolutely and irrevocably constitute and appoint the said [*purchaser*], his executors or administrators, the true and lawful attorney and attornies of him the said [*vendor*], his executors or administrators, for him or them, and in his or their name or names, or otherwise, to receive, and, if the said [*purchaser*], his executors or administrators, shall deem it expedient so to do, to sue for and recover the said monies hereby assigned, and when the same, or any part thereof, shall be received, to give valid acquittances and discharges for the same, and generally to perform all acts whatsoever which shall be requisite, in order to give complete effect to the assignment hereby made, and to appoint a substitute or substitutes for all or any of the purposes aforesaid (*a*), and such substitution at pleasure to revoke; the said [*vendor*] hereby ratifying and confirming, and agreeing to ratify and confirm, whatsoever his said attorney or attornies, or his or their substitute or substitutes, shall lawfully do in the premises. AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*purchaser*], his executors and administrators, that the said bond or obligation hereby assigned, or intended so to be, is now a good and valid bond, and of full force and virtue for the sum of £—— and interest as aforesaid: And that there is now justly owing to him the said [*vendor*], the said principal sum of £——, and interest thereon from the —— day of —— last as aforesaid, upon or by virtue of the same bond; And also, that the said [*vendor*] will not, nor shall his executors or administrators, or any of them, at any time hereafter, revoke the power or authority hereinbefore contained (*b*), or receive, compound for, or discharge the said monies hereby assigned, or any part thereof, or release or interfere with any action or suit which shall or may be commenced in the name or names of him, them, or any of them, in pursuance of these presents, for the recovery of the same, without the consent

Power of attorney.

Covenant by vendor,

—that bond is valid;

—not to revoke power, or receive debt;

(*a*) If the purchaser assign the debt, he must exercise this power of substitution, ut ante, Vol. 6, p. 405.

(*b*) According to the modern decisions, this power, being coupled with an interest, would be irrevocable. Due notice of this assignment must be given to the debtor. The suggestions, ante, Vol. 5, p. 294, as to the precautions proper to be taken by the mortgagee of a debt, apply for the most part to a purchaser.

99. BOND DEBT.

in writing of the said [*purchaser*], his executors, administrators, or assigns; but that the said [*vendor*], his executors, and administrators, will and shall at all times avow, justify, and confirm all such matters and things, process and proceedings, as he the said [*purchaser*], his executors, administrators, or assigns, or any other person or persons by or through his or their direction or procurement, shall, in pursuance of the power hereinbefore contained, do, commence, bring, or prosecute, upon or by reason or means of the said bond or obligation and premises; *And further*, that the said [*vendor*], his executors and administrators, will and shall, at all times hereafter, on the request and at the costs of the said [*purchaser*], his executors, administrators, or assigns, make, do, and execute all such further assignments, letters of attorney, acts, deeds, matters, and things, for the more effectually assigning and assuring unto the said [*purchaser*], his executors, administrators, and assigns, the said bond or obligation, and enabling him or them to receive and recover the principal money and interest already due, and hereafter to grow due thereon, for his and their own absolute use and benefit, in manner aforesaid, according to the true intent and meaning of these presents, as by the said [*purchaser*], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably required. And the said [*purchaser*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*vendor*], his executors and administrators, that he the said [*purchaser*], his executors, administrators, and assigns, will and shall, at all times hereafter, effectually save harmless and keep indemnified the said [*vendor*], his executors and administrators, from and against all losses, costs, charges, damages, and expenses, whatsoever, by reason of his or their name or names being used in any action, suit, or other proceeding, which shall or may be brought or instituted by the said [*purchaser*], his executors or administrators, or his or their substitute or substitutes, under or by virtue of the power or authority in that behalf hereinbefore contained, or otherwise, by reason or in consequence of the same power or authority, or in relation thereunto (*c*). IN WITNESS &c.

—and for further assurance.

Covenant by purchaser to indemnify vendor, by reason of his name being used in any action.

As to the stamp duty attaching under the circumstances of the precedent.

(*c*) It is conceived that this deed would be liable only to a common deed stamp, without regard to the amount of the consideration-money, as it seems to fall within the reasoning of the Court of King's Bench in the case of *Warren* v. *Howe*, 3 Dowl. & Ry. 494; 2 B. & Cr. 233, (see

99. BOND DEBT.

also *Belcher* v. *Sikes*, 6 B. & Cr. 234, stated ante, Vol. 7, p. 420), in which it was decided, that an assignment of a judgment debt was not liable to an ad valorem stamp. The Lord Chief Justice observed—"The words (of the stamp act) are 'conveyance of any right, title, interest, or claim to any lands, tenements, rents, annuities, *or other property*,' for or in respect of the deed, whereby the lands or other things sold shall be conveyed to the purchaser. The statute enumerates things which are the subject of sale, and which are usually converted into money; and I think that the expression 'other property' *applies only to property of the same description as that previously mentioned, viz. such property as is usually the subject of sale, and may be converted into money.* Now, a judgment debt is not a property of that description." His Lordship added, "it clearly does not fall within the other clause which has been adverted to (which was the clause imposing the duty on mortgages), because it is not a conveyance of property in trust for sale." The last observation of the noble Judge is singular, because the purpose of the deed, though not a trust for sale, was to secure a sum of money owing from the assignor to the assignee, with an ultimate trust, after the satisfaction of that debt, for the assignor; so that it was, to all intents and purposes, a mortgage. The error, (for such I must take the liberty to consider it), however, is unimportant, as the words of the two clauses are not, in regard to this point, materially different.

No ad valorem duly unless instrument operates as a conveyance.

[An instrument, although intended to be final and conclusive between the parties, is not liable to the ad valorem stamp duty, unless it amounts at law to an actual conveyance of the vendor's interest; and therefore, where by agreement not under seal the plaintiffs agreed to sell certain beds of coal to the defendants at a price to be paid part on the day of sale, and the rest by instalments, and undertook that they had power to sell the coal, and for quiet enjoyment, it was held, that the instrument was sufficiently stamped as an agreement. Alderson, B., said, "In order to require an ad valorem stamp, the instrument must be a conveyance;—you cannot say that in this case any part of the land or coals vested in the purchaser. The rule in construing a stamp act is, that to raise a valid objection to a document for want of a stamp, you must hit the bird in the eye." *Phillips* v. *Morison*, 8 Jur. 343; *Wilmot* v. *Wilkinson*, 6 B. & Cr. 507.]

100. POLICY OF LIFE ASSURANCE.

100. ASSIGNMENT *of a* POLICY *of Life* ASSURANCE *by a* VENDOR *to a* PURCHASER. (*A concise Form*) (*a*).

Parties. THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part: WHEREAS, by a policy of assurance

Recital of policy; bearing date on or about the —— day of ——, under the hands and seals of three of the directors of the —— insurance company, and numbered ——, the funds and property of the said company were made liable to pay to the executors, administrators, or assigns, of the said [*vendor*], the sum of £—— sterling within the period of —— months after his decease, subject nevertheless to the provisoes therein contained, And also to the payment of the annual premium of £——, during the life of the said [*vendor*]. AND WHEREAS

—contract for purchase. the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the said policy of assurance at

Testatum. the price or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of the sum of £—— sterling, paid by the said [*purchaser*] to the said [*vendor*] at or immediately before the execution of these presents, the receipt of which sum the said [*vendor*] doth hereby acknowledge, and therefrom doth absolutely acquit and discharge the said [*purchaser*], his executors, administrators, and assigns, he the said [*vendor*]

Assignment. *Doth* by these presents assign, transfer, and set over unto the said [*purchaser*], his executors, administrators, and as-

Policy. signs, ALL THAT the hereinbefore-recited policy of assurance on the life of the said [*vendor*], *And also*, the said sum of £—— thereby assured, and all and every other the sum and sums of money which shall or may become due and owing by virtue thereof; And all the right, title, interest, benefit, claim, and demand, whatsoever at law or in equity of him the said [*vendor*], in and to the said policy, monies, and pre-

Habendum. mises; TO HAVE, RECEIVE, AND TAKE the said policy of assurance, sum and sums of money, and other the premises

(*a*) See a longer form of an assignment of a policy of life assurance, ante, Vol. 6, p. 251.

100. POLICY OF LIFE ASSURANCE.

hereby assigned, unto the said [*purchaser*], his executors, administrators, and assigns, for his and their own absolute use and benefit, [with full power and authority for the said [*purchaser*], his executors, administrators, or assigns, at his or their own costs, in the name or names, and as the attorney or attornies of, the said [*vendor*], his executors or administrators, to sue for and recover the sum or sums of money at any time or times hereafter to become recoverable by virtue of the hereinbefore-recited policy of assurance, and at any time hereafter, whether such monies shall have already become due or not (*b*), to give effectual discharges for the same, and also with power from time to time to appoint a substitute or substitutes for all or any of the purposes aforesaid.] AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*purchaser*], his executors, administrators, and assigns, that the hereinbefore-recited policy of assurance is now in full force and virtue for the said sum of £—— thereby expressed to be assured; *And* that he the said [*vendor*] hath full power to assign the same unto the said [*purchaser*], his executors, administrators, and assigns, in the manner aforesaid; *And* that he the said [*vendor*] will not hereafter do any act, or commit any default (except so far as respects the payment of the future premiums to become due in respect of the said policy which are to be paid by the said [*purchaser*]), by means whereof the said policy of assurance shall become void or voidable, or the power or authority hereinbefore contained for receiving or recovering the monies to become due thereupon, shall be revoked or prejudicially affected, or the acts or proceedings of the said [*purchaser*], his executors, administrators, or assigns, or his or their substitute or substitutes by virtue thereof, shall be defeated or prejudiced; *And* that in case he the said [*vendor*] shall hereafter go beyond the seas, or do any other act by reason whereof the premium

Power of attorney.

Covenants by vendor,

—that policy is in force;

—for right to assign;

—not to occasion any forfeiture;

—to pay any additional premium for going abroad, &c.;

(*b*) [When the policy is effected on the life of the insured himself, this power is entirely useless, even to enable the purchaser to give discharge on a sale of the policy to the office in the lifetime of the insured, as the assignment by deed is of itself a sufficient delegation of a power to give releases; and it is conceived that even an assignment by writing unsealed, and the subsequent dealings between the purchaser and the office would support a plea of satisfaction to any action the executors of the insured might be so ill advised as to bring. Vide ante, Vol. 6, p. 255.]

As to power of attorney in assignment of life policy.

100. POLICY OF LIFE ASSURANCE.

payable in respect of the said policy shall be increased beyond the said annual sum of £——, then and in every such case he the said [*vendor*], his executors or administrators, will or shall pay such additional premium, and effectually indemnify and save harmless the said [*purchaser*], his executors, administrators, and assigns, from all loss or damage in respect thereof (*c*); *And lastly*, that he the said [*vendor*], his executors or administrators, will or shall at all times hereafter, on the request and at the costs of the said [*purchaser*], his executors, administrators, or assigns, make, do and execute such further assignments, acts, and assurances, for the more effectually vesting in him the said [*purchaser*], his executors, administrators, and assigns, the said policy of assurance, monies, and premises, expressed to be hereby assigned, [and for confirming to him or them the power and authority hereinbefore contained,] as by the said [*purchaser*], his executors, administrators, or assigns, shall be reasonably required. [AND the said [*purchaser*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*vendor*], his heirs, executors, and administrators, that he the said [*purchaser*], his executors, administrators, and assigns, will and shall at all times hereafter effectually save harmless and keep indemnified the said [*vendor*], his heirs, executors, and administrators, from and against all losses,

—and for further assurance.

Covenant of indemnity by purchaser.

As to vendor's covenant not to leave the kingdom.

(*c*) The propriety of this covenant depends on the nature of the agreement between the parties. If the vendor does not go the length of contracting to pay any additional premium which his departure from England might occasion, (which is certainly not of course), he ought at least to stipulate not to leave the country without notice, and without affording the purchaser an opportunity of paying the additional premium. The covenant would then be varied as follows:—

"And that he the said [*vendor*] will not at any time hereafter go or travel to any place or places out of Great Britain, without giving previous notice or intimation in writing of his intention so to do, to the said [*purchaser*], his executors, administrators, or assigns, so as to afford him or them an opportunity of paying any additional premium or premiums, which according to the terms of such policy would become payable in that event."

Sometimes, by the terms of the policy, an additional premium becomes payable on entering into active military or naval service. The draughtsman will, of course, in every case, frame the stipulation with reference to the particular terms of the policy in question.

costs, damages, and expenses, whatsoever, which he or they may incur or sustain by reason of any action or other proceeding which shall or may be brought by the said [*purchaser*], his executors or administrators, or his or their substitute or substitutes, in the name or names of the said [*vendor*], his executors or administrators, by virtue of the power or authority in that behalf hereinbefore contained, or in relation thereunto] (*d*). In witness &c.

100. POLICY OF LIFE ASSURANCE.

(*d*) In *Blandy* v. *Herbert*, 9 B. & C. 396, it was held, that an assignment of a policy of marine insurance on which no loss had occurred, was not a conveyance of "property" within the meaning of the stamp act, so as to be the subject of an ad valorem stamp. Perhaps, it is not quite clear that the principle would apply to an assignment of a policy of life insurance, which is distinguishable from a marine insurance, in the fact, that, the event on which the money is payable is not, though the time of it is, contingent. It would be safer, therefore, to place an ad valorem duty on this deed; but see the observations at the end of the last precedent, ante, p. 642. [If the case of *Godsall* v. *Boldero*, ante, Vol. 5, p. 302, was rightly decided, on the ground that a life insurance is a mere contract of indemnity, the rule in *Blandy* v. *Herbert* must necessarily extend to an assignment of the benefit of such a contract; but it has been shewn that the decision in *Godsall* v. *Boldero* is open to much objection, and it should be remembered that it is unsupported by any other actual decision, and is not acted upon in practice by the offices.]

As to the necessity of an ad valorem stamp.

Notice of this assignment must be given to the insurance office. Vide ante, Vol. 5, pp. 271, 458.

101. [ASSIGNMENT *of a* Policy of Insurance *of the* Amicable Society, *with the Concurrence of the* Assignees *in* Bankruptcy *of a* Mortgagee *by* Deposit, *and the Bankrupt* (*a*).

101. POLICY BY THE AMICABLE SOCIETY.

This indenture, made the —— day of ——, Between [*vendor*], of &c., of the first part; [*assignees*], of &c.,

Parties.

(*a*) [Notice of this assignment should be given to the office in the usual manner. All the persons insured in the Amicable Society participate in the profits, under certain regulations, and are, therefore, copartners. This circumstance has been thought to render actual notice of the assignment to the office unnecessary for the purpose of completing

Notice of assignment.

As to notice of assignments of

101. POLICY BY THE AMICABLE SOCIETY.

of the second part; [*bankrupt*], of &c., of the third part; and [*purchaser*], of &c., of the fourth part. WHEREAS by

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policies in mutual insurance offices.

the title to the policy, or of taking it out of the assignor's reputed ownership, as to which, vide ante, Vol. 5, pp. 271, 458. The point was so decided in *Ex parte Waithman*, 2 Mon. & Ay. 364, and again in *Duncan* v. *Chamberlayne*, 11 Sim. 123, when Sir L. Shadwell, V. C., said, "The rule is, that notice to one partner is notice to the partnership; and as all the insurers in the Equitable Insurance Office are partners in the society, the fact of the assignment of a policy by one of the assured must be taken to be a fact of which the society had notice." The doctrine was acted upon by the Court of Review, in *Ex parte Rose, re Ross*, 2 Mon. Dea. & De G. 131; and in *Ex parte Smith, re Styan*, id. 213; but the decisions of that court at that period are of very little value. It would seem, from the cases of *Ex parte Arkwright*, 3 Mon. Dea. & De G. 144, and *Pinkett* v. *Wright*, 2 Hare, 137, that the other two learned Vice-Chancellors consider the doctrine in *Ex parte Chamberlayne* to be at least open to discussion; and when the foundation of it is examined, it will be apparent that it cannot be supported. When notice to one partner is held to affect another, it is for the purpose of *binding* the latter, so that he may not, by shutting his eyes to his partner's dealings, and by avoiding any direct notice of them, enable himself to obtain an advantage, which would be fraudulent if he had distinct notice. The notice which is necessary to complete an equitable title to, or to exclude the reputation of, ownership of a chose in action is of a different nature, and is required to be given for a distinct purpose. It might more properly be termed *intimation*. Its object is to provide a kind of equitable registry to enable parties intending to deal with the owner on the faith of his ownership, to ascertain by inquiry whether he retains the unincumbered title which he once had; and therefore, whenever there is an ostensible trustee, debtor, or stakeholder, notice of every assignment or charge is required to be given to him, (ante, p. 113). Any notice which will put it in the power of an inquirer to obtain the information he is in search of, or at least which has that tendency, is a good notice for this purpose; any notice which has not that tendency is no notice for this purpose. *Implied* notice to a trustee or stakeholder is, therefore, out of the question. Notice, for instance, to the solicitor acting for trustees in the matter of the trust, would clearly be no notice to them for this purpose. But were it granted that implied notice would be sufficient, there can be no such implication in the case in question. The assignee, of course, is no partner until he has been admitted and recognised as such according to the rules of the society. The notice, therefore, must come, if at all, through the assignor; but it is his concealment that the notice is to guard against, and there can be no presumption that he has communicated a fact which it is conceded he desired and studied to conceal. See *Kennedy* v. *Green*, 3 Myl. & K. 698, ante, Vol. 5, p. 490. It is to be observed, too, that it is very doubtful, whether in any case the rule of implying, from the knowledge of one partner, notice to the whole firm, can be extended to a corporation or quasi corporation carrying on business exclusively through certain recognised

101. POLICY BY THE AMICABLE SOCIETY.

an instrument of policy of assurance under the common seal of the corporation of the Amicable Society, London, and also under the hands of twelve of the directors of the same society, bearing date on or about the —— day of ——, the said [*vendor*] was admitted a member of the said so-

Recital of policy by the Amicable Society.

officers. See *Steward* v. *Dunn*, 8 Jur. 218. The consequence of the doctrine in *Duncan* v. *Chamberlayne* would be, that, if the insured had executed an assignment of the policy, and the policy had not been delivered over to the assignee, the officer would be answerable to the latter, after payment to the party holding the policy. See *Ex parte Hennessey*, 2 Dru. & W. 555; *West* v. *Reid*, 2 Hare, 256. That the reputation of ownership does not follow the mere custody of the policy is a rule which, though open to much observation, is perfectly well settled. *Williams* v. *Thorpe*, 2 Sim. 357; *Ex parte Arkwright*, 3 Mon. Dea. & De G. 129. The consequence is, that the same policy of insurance may be at the same time in the reputed ownership of several persons. Thus, if A. mortgage a policy to B., and B. mortgage the policy to C., and no notice of either mortgage is given to the office, and B. become bankrupt, the policy will, as against C., be held to have been in the order and disposition of B. But if A. should become bankrupt, it would, as against B. or his assignees, be held to have been in the order and disposition of A. *Ex parte Wood, re Loosemore*, 3 Mon. Dea. & De G. 315.]

The same policy may be in the reputed ownership of several persons at one time.

[It may be here noticed, that in *Gibson* v. *Overbury*, 7 Mee. & W. 555, it was held, that though the monies secured by a policy of insurance remained in the reputed ownership of the assured after he had deposited the policy as a security, yet his assignees in bankruptcy could not recover the policy itself in trover. The principle of the decision is very questionable.]

Title to custody of policy.

[Another decision on this subject, which seems to be open to remark, was recently pronounced in the case of *West* v. *Reid*, 2 Hare, 249, where Sir J. Wigram, V. C., held, that the mortgagee of a policy of insurance who had neglected to exclude the mortgagor's reputed ownership, was nevertheless entitled as against the mortgagor's assignees in bankruptcy to a lien on the proceeds for the amount of premiums which he had paid to keep the policy on foot, as well *before* as after the date of the fiat. It is difficult to see how advances for the purpose of keeping the policy on foot can be distinguished from advances for any other purpose; —they are all equally made for the benefit of the bankrupt, and the implied lien on the policy for such advances cannot be stronger than the lien for the mortgage money created by express charge. There can be no distinction between advances made to the bankrupt himself to enable him to pay the premiums and advances applied directly to that purpose by the mortgagee. *Gibson* v. *Overbury*, *Schondler* v. *Wace*, 1 Camp. 487, and *Burridge* v. *Row*, 1 You. & C. C. C. 183, were cited in support of the decision, but the point did not arise in any of them. In *Schondler* v. *Wace*, the premiums for which a lien was allowed had partly accrued due, and were all paid after the date of the commission, so that they were, in fact, paid to the use of the assignees.]

West v. *Reid*. Lien for premium by mortgagee of policy who has not given notice.

101. POLICY BY THE AMICABLE SOCIETY.

ciety on two shares, numbered —— and —— respectively, and the said society did thereby oblige themselves and their successors to pay to the executors, administrators, or assigns, of the said [*vendor*] such a proportion or share of the joint stock and fund of the said society as should become due in manner therein mentioned upon the death of the said [*vendor*], but subject to the payment by the said [*vendor*] or his assigns of the annual premium of £—— during his life, and subject to the other stipulations, provisoes, and conditions, therein contained. —of deposit security; AND WHEREAS on or about the —— day of ——, in the year ——, the above-recited policy of assurance was by the said [*vendor*] delivered to and deposited (*b*) with the said [*bankrupt*] as a security for the repayment to him by the said [*vendor*] of the sum of £—— with interest thereon. —of proceedings in bankruptcy; AND WHEREAS a fiat for a prosecution in bankruptcy under the hand of the Lord High Chancellor of England was on the —— day of —— duly awarded and issued against the said [*bankrupt*], who hath been thereunder duly found and declared a bankrupt, and the said [*creditors' assignee*] hath been duly chosen by the creditors to be assignee of his estate and effects, and the said [*official assignee*] hath been duly appointed official assignee under the said fiat. —of amount due on mortgage. AND WHEREAS there is now owing to the said [*assignees*], as such assignees of the estate and effects of the said [*bankrupt*], for principal and interest on the above-recited deposit security, the sum of £——. AND WHEREAS the said [*vendor*] and [*assignees*] have agreed with the said [*purchaser*] for the absolute sale to him of the said policy of insurance or shares, and all benefit thereof, free from the said mortgage security and all other incumbrances, at the price of £——, to be paid to the said [*assignees*] in part satisfaction and discharge of the said debt or sum of £—— so due to them from the said [*vendor*] as aforesaid, but in full satisfaction and discharge of the said policy or shares from the same sum and the said security for the same. AND WHEREAS the said [*bankrupt*] hath agreed to join in and execute these presents for the purposes hereinafter mentioned. Testatum. NOW THIS INDENTURE WITNESSETH,

(*b*) [In fact, a mortgage-deed was executed; but the deed being insufficiently stamped, the parties, in order to save expense, agreed to treat the transaction as a mere deposit, the mortgage-deed being, of course, delivered to the purchaser.]

101. POLICY BY THE AMICABLE SOCIETY.

that in pursuance of the said agreement and in consideration of the sum of £—— sterling to the said [*official assignee*] at or before the execution of these presents in hand paid by the said [*purchaser*], at the request and by the direction of the said [*vendor*], the receipt of which sum of £—— the said [*official assignee*] doth hereby acknowledge, and from the same and every part thereof the said [*creditors' assignee*] and [*bankrupt*] do hereby acquit, release, and for ever discharge the said [*purchaser*] and [*vendor*], and each of them, and the executors, administrators, and assigns of each of them, and which sum the said [*assignees*], [*bankrupt*], and [*vendor*], do respectively hereby declare to be in full for the absolute purchase of the said policy of assurance or shares, free from the said mortgage security, and also from all equity of redemption; the said [*assignees*] and [*bankrupt*] Do by these presents bargain, sell, and assign, and the said [*vendor*] DOTH grant, bargain, sell, assign, and confirm unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT and those the above-recited policy of assurance of or by the said Amicable Society, and two several shares of and in the joint stock and fund of the same society, and all and every the dividends, bonuses, additions, and sum and sums of money to become payable, or to be received under or by virtue of the same, or in respect thereof, and the full benefit and advantage of the same policy of assurance, shares, and premises; And all the right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of them the said [*assignees*], [*bankrupt*], and [*vendor*] respectively, to, in, or upon the same policy and premises, or to, in, or upon the joint stock and fund of the said society in respect thereof; [*Together with* full and irrevocable power and authority to and for the said [*purchaser*], his executors, administrators, or assigns, or to and for any substitute or substitutes to be by him or them revocably or irrevocably nominated, as the attorney or attornies, and in the names or name of the said [*assignees*], [*bankrupt*], and [*vendor*], or of any of them, or of the executors or administrators of them, or of any of them], to ask, demand, sue for, recover, receive, and give effectual receipts, releases, and discharges, for the said sum or sums of money and premises, or any part thereof. TO HAVE, RECEIVE, AND TAKE the said policy, shares, sum and sums of money, and premises unto the said [*purchaser*], his executors, administrators, and assigns, for his

Assignees, bankrupt, and vendor assign

policy of Amicable Society.

Power of attorney.

Habendum.

101. POLICY BY THE AMICABLE SOCIETY.

and their own absolute use and benefit, free from the above-recited mortgage security, but subject to the payment of the annual premium or premiums henceforth to become due or payable, under or by virtue of the above-recited policy. [AND each of them, the said [*assignees*] and [*bankrupt*], for himself, his heirs, executors, and administrators, Doth hereby covenant (*c*) with the said [*purchaser*], his executors and administrators, that he (the said covenanting party) hath not, at any time heretofore, made, done, committed, or suffered, or been party or privy to any act, deed, matter, or thing whereby or by means whereof the said policy of assurance, shares, and premises, or any part thereof, are, is, can, shall, or may be in anywise forfeited, avoided, vitiated, released, impeached, assigned, charged, or incumbered.] AND the said [*vendor*], for himself, his heirs, executors, and administrators, Doth hereby covenant with the said [*purchaser*], his executors and administrators, that, notwithstanding any act, deed, matter, default, or thing, by him the said [*vendor*] made, done, committed, or knowingly permitted or suffered to the contrary (other than the deposit and security hereinbefore recited), the said policy of assurance is now in full force and virtue; *And that* (notwithstanding any such act, deed, matter, default, or thing, as aforesaid) they the said [*assignees*], [*bankrupt*], and [*vendor*], or some or one of them, now have or hath full power and authority by these presents to assign the same unto the said [*purchaser*], his executors, administrators, and assigns, in manner aforesaid, free from all incumbrances; *And that* he the said [*vendor*] will not hereafter do any act or commit any default (except so far as respects the payment of the annual premium of £—— henceforth to become due in respect of the said policy, which payment is henceforth, during the continuance of the said policy, to be made by the said [*purchaser*], his executors, administrators, or assigns) whereby or by means whereof the said policy of assurance, shares, and premises, or any of them, shall or may be in anywise forfeited, avoided, vitiated, released, or impeached, whereby or by means whereof the said [*purchaser*], his executors, administrators, or assigns, shall or may be prevented or hindered from recovering, obtaining, or receiving the monies thereby secured, and the full benefit thereof; *And that*

Covenant by assignees and bankrupt that they have not incumbered.

Covenants by vendor, that policy is in force;

—for right to assign;

—not to cause forfeiture;

(*c*) [This covenant in the case of a mere deposit-security may very well be dispensed with.]

in case &c., (*to pay additional premium, caused by going beyond seas, &c., ut ante, p.* 645); *And also* that he the said [*vendor*], and his executors and administrators, and all persons having or lawfully claiming any title to or interest in the said policy, shares, and premises, or any of them, by, through, under, or in trust for him, will or shall (*make further assurance, ut ante, p.* 646). And the said [*purchaser*], for himself, his heirs, executors, administrators, and assigns, Doth hereby covenant with the said [*vendor*], his heirs, executors, and administrators, that he the said [*purchaser*], his executors, administrators, or assigns, will or shall henceforth during the continuance of the said policy of assurance, duly pay the said annual premium of £——, and will or shall from time to time, and at all times hereafter, effectually save harmless and keep indemnified the said [*vendor*], his heirs, executors, and administrators, from and against all losses, costs, damages, and expenses whatsoever, which he or they may incur or sustain by reason of any non-payment thereof, or by reason of any action, &c. (*ut ante, p.* 646). In witness &c.

101. POLICY BY THE AMICABLE SOCIETY.

—and for further assurance.

Covenant by purchaser to indemnify vendor.

102. [ASSIGNMENT *of the* TRADE *of a Coal Merchant, in consideration of a sum of Money to be paid by Instalments, with appropriate Covenants* (*a*).

102. ASSIGNMENT OF TRADE.

THIS INDENTURE, made the —— day of ——, Between [*vendor*], of &c., coal merchant, of the one part;

Parties.

(*a*) [The existence of what is popularly understood by the term "goodwill" is not recognised by the law. A sale of "the goodwill of a business," without more, is a mere nullity. The variety and the vagueness of the meanings with which the term is used on different occasions would indeed render it very difficult even to frame a definition of the thing called goodwill, and still more difficult to invest it with any certain incidents. Without attempting a definition, we may perhaps say, by way of description, that goodwill in its largest sense is that chance of custom which can be transmitted from one trader or professional man to another by any means capable of deriving effect from the habits or prepossessions of the customers of the former or the class from which custom is expected to flow. This advantage may be attached either to the place of business, to the name or firm in which it is carried on, or to the actual person of the trader or professional man;

Goodwill, its nature and incidents.

102. ASSIGNMENT OF TRADE.

and [*purchaser*], of &c., coal merchant, of the other part. WHEREAS the said [*vendor*] hath for several years last past

Recital of vendor's trade;

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though the two latter sources of attraction are, perhaps, of the same nature. The continuance of the resort of certain customers to a certain place of business may be caused by mere habit or by the convenience of the locality, in which latter case the advantage is more properly a permanent advantage of situation than what is meant by goodwill: it is attached exclusively to the place of business, and not to the business and the place together. Again, the continuance of the resort of particular customers to a particular firm or person independently of locality, (so far as that is not inconveniently changed), may result either from habit, or from an expectation that a certain agreeable, or convenient, or honest or skilful mode of conducting the business will be continued*. And lastly, the transfer of the customers of one person to another may be the result of the personal influence and recommendations of the former acting on the friendship of his late customers, or on their confidence in his judgment or integrity.]

Goodwill how transferrable.

[Any benefit in respect of trade which is attached to a particular thing, as to the house of business, to the use of a distinctive mark, to the name of a secret compound, &c. will pass with it; so that the mortgagee of a leasehold house is entitled to the benefit of the entire proceeds of the sale, although what is called the goodwill is known to have formed part of the value in the eyes of the purchaser, and was expressly mentioned in the sale; (*Chissum* v. *Dewes*, 5 Russ. 29; ante, Vol. 5, p. 115; see *Hutchinson* v. *Morley*, 7 Scott, 341); and an administrator or executor who has carried on the trade of the deceased until the sale of the premises will be bound to account not only for the profit made by the use of the assets, but for the full proceeds of the sale of the premises and goodwill. (See *Cook* v. *Collingridge*, Jur. 607; *Hitchcock* v. *Coker*, 6 Ad. & E. 438; ante, Vol. 3, p. 466; *Willats* v. *Blanford*, 1 Hare, 253; *Portlock* v. *Gardner*, Id. 494; ante, Vol. 7, p. 117.]

Personal goodwill only transferrable by means of particular stipulations.

[But, where the goodwill is purely personal, the Courts will not take notice of it as a thing having any value or existence, either in the administration of assets, or as between parties contracting for it under that specific description. *Spicer* v. *James*, Rolls, 1830; Collyer on Partn. 104, 2nd ed.; *Farr* v. *Pearce*, 3 Mad. 78; ante, Vol. 3, p. 469, Vol. 7, p. 409. See as to the right to the use of a partnership firm, *Crutwell* v. *Lye*, 17 Ves. 335, 1 Rose, 123; *Lewis* v. *Langdon*, 7 Sim. 421,

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As to sale of goodwill of a profession.

* [In this view of the case, it will be apparent, that the distinction which has been taken between a sale of a trade and of a profession is unsound. A customer who resorts to a particular trader, because he believes him to be a fair dealer, has as much ground of complaint if the person is secretly changed, as the customer of a professional man, relying on his skill, would have under similar circumstances. See *Burn* v. *Gery*, 4 East, 190; ante, Vol. 3, p. 470, Vol. 7, p. 406; *Whittaker* v. *Howe*, 3 Beav. 389; *Thornbury* v. *Bevill*, 1 You. & C. C. C. 554.]

102. ASSIGNMENT OF TRADE.

carried on a considerable trade and business as a coal merchant and dealer in coal and coke; and is at the date hereof engaged in the same trade and dealing. And in consideration of the sum of 300*l.*, to be paid to him by the said [*purchaser*], at the time of the execution of these presents, and of the further sum of 250*l.* agreed to be paid to him by the said [*purchaser*] on the 31st day of December, which will be in the year 18—, together with interest for the same, after the rate of 5*l.* per centum per annum in the meantime, to be paid by equal half-yearly payments, on the 30th day of June, and 31st day of December, 18—, and to be secured by the bond or obligation of the said [*purchaser*]; and also of the like sum of 250*l.*, also agreed to be paid to him the said [*vendor*], by the said [*purchaser*], on the 31st day of December 18—, with interest for the same after the rate aforesaid in the meantime, to be paid on the 30th day of June and on the 31st day of December in each of the years 18— and 18—, and also to be secured by the said bond or obligation of the said [*purchaser*], he the said [*vendor*] hath, on his part, agreed to sell, relinquish, and assign unto the said [*purchaser*] the good-will, benefit, and property,

—contract for sale, in consideration of money to be paid by instalments, and secured by bond.

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ante, Vol. 7, p. 469. The vendor of the goodwill of a business may, immediately after the receipt of the purchase-money, set up next door to the purchaser, and may solicit the custom of his former customers, if he has not engaged to abstain from doing so; and is not bound to introduce his vendor to the customer, or to recommend him to them, or to do any one act for the purpose of giving effect to the sale, unless he has expressly engaged to do that specific act. What, therefore, the Courts take notice of in enforcing a so-called sale of a goodwill is, not the goodwill, but the specific engagements of the vendor; these will be enforced where they are sufficiently definite, and are not thought to be contrary to public policy. See the cases stated ante, Vol. 3, pp. 458, 470; *Dakin* v. *Cope*, 2 Russ. 170.]

Stipulations respecting goodwill, how to be framed.

[The vitality of the instrument by which it is endeavoured to carry into effect the sale of a goodwill, therefore, resides solely in the particular stipulations which are introduced, and the draughtsman's care must be to make them as stringent as possible consistently with the rule denying validity to *unreasonable* or unnecessary restraints on trades,—definite,—and, as far as is practicable, of such a nature as to allow of the interference of equity in directing specific performance. Stipulations, which equity would not undertake to enforce, on account of the impossibility of doing so with effect, should be fortified by covenants to pay liquidated damages, (ante, Vol. 3, pp. 325, 472), and even with a view to that remedy are chiefly valuable for their operation in terrorem.]

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of his the said [*vendor's*] trade and business, and he the said [*purchaser*] hath, on his part, agreed to become the purchaser of the said trade and business, at the before-mentioned prices or considerations of 300*l.*, 250*l.*, 250*l.*, making together the sum of £——, and to pay and secure the same as hereinbefore mentioned, together with interest for the same sums of 300*l.*, 250*l.*, 250*l.*, in the meantime, until payment thereof respectively. And for effectuating the before-mentioned sale, and the agreement understood between them, the said [*vendor*] and [*purchaser*], have agreed to enter into the covenants on their respective parts hereinafter contained.

Testatum.

In consideration of money paid, and future instalments secured by bond,

NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of 300*l.* sterling to the said [*vendor*] in hand paid by the said [*purchaser*] before the sealing and delivery of these presents, the receipt whereof the said [*vendor*] doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, and every of them, for ever, by these presents; and also in consideration of the further sums of 250*l.* and 250*l.*, and interest thereon respectively, agreed to be paid to the said [*vendor*] by the said [*purchaser*], at the times and in manner hereinbefore mentioned, and secured by the bond of the said [*purchaser*], bearing even date herewith, as the said [*vendor*] doth hereby admit; and also in consideration of the covenant on the part of the said [*purchaser*] hereinafter contained,

vendor assigns trade.

he the said [*vendor*] DOTH, by these presents, grant, bargain, sell, assign, and relinquish unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT the before-mentioned trade or business of a coal merchant and dealer in coal and coke of him the said [*vendor*], and the good-will thereof, and all benefit and advantage thereof (*b*), and all the

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Apprentices.

(*b*) ["And also all the benefit of the services of all and every such persons as now are the apprentices of the said [*vendor*], for and during such term, respectively, as each such respective apprentice by his indenture of apprenticeship is obliged to serve; the said [*purchaser*], his executors and administrators, during such service, instructing them in the said trade or business, and providing, at his or their own costs, for their meat, drink, washing, and lodging, and performing all other the duties of a master to an apprentice."]

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right, title, interest, and benefit, whatsoever, both at law and in equity, of him the said [*vendor*], therein and thereof. To HAVE, RECEIVE, TAKE, CARRY ON, AND ENJOY all the said hereby assigned premises, and all benefit and advantage thereof, unto, and by the said [*purchaser*], his executors, administrators, and assigns, henceforth, to and for his and their absolute use and benefit, in as full, ample, and beneficial a manner in all respects, and to all intents and purposes as he the said [*vendor*] could or might have held and enjoyed the same, in case these presents had not been made or executed.

Habendum.

AND the said [*vendor*] doth hereby, for himself, his executors and administrators, covenant and agree with the said [*purchaser*], his executors, administrators, and assigns, that he the said [*vendor*], his executors and administrators, will and shall, by writing and circulating letters, and by personal introduction and other practicable means in his and their power, use and exercise his and their best endeavours to introduce the said [*purchaser*] to his (the said [*vendor*]'s) present and late customers and friends who have been in the habit of employing and dealing with him the said [*vendor*] in his said trade or business of a coal merchant and dealer in coals and coke;

Vendor covenants to introduce purchaser to customers;

And also will and shall, forthwith or within —— from the date hereof, make out and deliver unto the said [*purchaser*] a written list of the present and former customers of and dealers with him the said [*vendor*];

—to deliver list of customers;

And also, that he the said [*vendor*] will not, at any time or period within —— years from the date hereof, or within —— miles of the city of London, either by himself or in partnership with any other person or persons, directly or indirectly, engage or be concerned in the trade or business of a coal merchant, or dealer in coals or coke, without obtaining the previous written consent of the said [*purchaser*] authorizing him so to do;

—not to carry on trade within a certain district;

And that, if he the said [*vendor*] shall make default in, or act contrary to, such lastly expressed covenant, he the said [*vendor*], his heirs, executors, or administrators, will or shall pay unto the said [*purchaser*], his executors, administrators, or assigns, the sum of £1000, as and for stipulated damages, and not by way of penalty merely;

—stipulated damages for default;

And further, that he the said [*vendor*], his executors and administrators, will and shall, from time to time and at all times hereafter, use his and their best and utmost endeavours to promote the welfare of and recommend the said

—to assist purchaser;

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[*purchaser*], in the hereby relinquished trade or business; *And also*, that he the said [*vendor*], his executors or administrators, will or shall, for the term of one whole year, to be computed from the date hereof, personally assist the said [*purchaser*] in transacting and carrying on the trade or business, by receiving orders for the said [*purchaser*], at his (the said [*vendor*]'s) present dwelling-house or residence at ——, or at any other dwelling-house which he may for the time being occupy, and transmitting such orders, as the same shall from time to time be received, unto the said [*purchaser*], at his place of business, with all practicable dispatch;

—during one year to receive orders;

—to allow purchaser to use vendor's name.

And also, that the said [*vendor*], his executors, and administrators, will and shall permit and suffer (*c*) the said [*purchaser*], his executors, administrators, or assigns, to use and associate the name of him (the said [*vendor*]) with the name or names of the said [*purchaser*], his executors, administrators, or assigns, in the said trade or business, in all sales of coal or coke by the said [*purchaser*], his executors, administrators, or assigns, in order and to the intent to promote the welfare of the said [*purchaser*], his executors, administrators, or assigns. BUT it is hereby expressly agreed and declared, that the said [*vendor*] is not to be under any obligation to attend at the wharf and premises at ——, where he [*vendor*] lately carried on his said hereby assigned trade or business, and that the said [*vendor*] is not to be considered as a partner with the said [*purchaser*], his executors, administrators, or assigns, or in any manner to participate with him or them in the fruits or profits of the hereby assigned trade or business, or be subject to any debts, losses, charges, damages, or expenses, on account or by reason or means thereof; but is to be indemnified therefrom by the said [*purchaser*], his heirs, executors, administrators, or assigns. AND, in consideration of the assignment and covenants on the part of the said [*vendor*] herein contained, the said [*purchaser*] doth hereby, for himself, his executors and administrators, covenant with the said [*vendor*], his executors and administrators, that he the said [*purchaser*], his heirs, executors, or administrators, will or shall pay unto the said [*vendor*] on the —— day of —— next the sum of £——, being the purchase-money for

Vendor not to attend to business, or be answerable as partner.

Purchaser covenants to pay purchase-money for coals;

(*c*) [This is a special provision which is only justified by the nature of the business and the restrictions subsequently introduced.]

102. ASSIGNMENT OF TRADE.

all the coals and coke, the property of the said [*vendor*], now lying at ——, at which price the said [*vendor*] hath already sold the said coals and coke, consisting of &c. (*d*); *And also*, that the said [*purchaser*], his heirs, executors, administrators, and assigns, will and shall, from time to time and at all times hereafter, well and sufficiently save, defend, and keep harmless and indemnified the said [*vendor*], his executors and administrators, and his and their estates and effects, from and against all actions, suits, costs, charges, demands, expenses, and consequences, whatsoever, which shall or may be instituted, prosecuted, sustained, or occasioned, or which he or they shall be put unto for or by reason of the said [*vendor*] having permitted the said [*purchaser*], his executors, administrators, and assigns, to use and associate the name of the said [*vendor*] with the name or names of the said [*purchaser*], his executors, administrators, or assigns, in the conduct and management of the said trade or business as aforesaid, or in any sales of coals or coke which may be made and transacted by the said [*purchaser*]; *And also*, that he the said [*purchaser*] his executors, administrators, or assigns, will not nor shall, at any time henceforth, use, or associate the name of the said [*vendor*] in any purchases which may be made by the said [*purchaser*], his executors, administrators, or assigns, in consequence of or relative to the said trade or business, but will and shall contract for and purchase the same in the sole name and on the sole account of the said [*purchaser*], his executors, administrators, or assigns; *And* that it shall and may be lawful to and for the said [*vendor*], or his agents, executors, or administrators, to wait upon and inquire of persons with whom the said [*purchaser*] may deal for coals or coke, or as to their manner of dealing with, and the nature of their charges to, the said [*purchaser*], his executors, administrators, or assigns, and to give to them such notice or notices as may be requisite, in order that the said [*vendor*] may not be subject to or charged with, but may be indemnified against the contracts, purchases, and dealings of the said [*purchaser*], his executors, administrators, and assigns; *And further*, that in case the profits which may be derived and realized by the said [*purchaser*] from the said trade or

—to indemnify vendor from consequences of permission to use his name;

—not to use vendor's name in purchases.

—if profits exceed a certain sum, to pay additional consideration.

(*d*) [This covenant will not subject the deed to any additional ad valorem or other stamp.]

102. ASSIGNMENT OF TRADE.

business shall, within the first year, to be computed from the date hereof, amount to and realize the amount of £——, then and in such case the said [*purchaser*], his executors or administrators, will or shall, on the —— day of ——, which will be in the year ——, pay or cause to be paid unto the said [*vendor*], his executors, administrators, and assigns, the further sum of £100 sterling, free from all deductions, in addition to the prices or considerations hereinbefore expressed to be paid or secured to be paid to the said [*vendor*]. (*Provisions for statement of accounts, vide ante, Vol.* 7, *p.* 305). IN WITNESS &c. (*e*).]

Stamp.

Not 20 -

Reference to other forms.

(*e*) [As the deed contains no conveyance or assignment of property, it will not require any ad valorem stamp; *Lyburn* v. *Warrington*, 1 Stark. 162, ante, Vol. 4, p. 456. This precedent is of a very simple nature; various provisions for special circumstances may be framed from the clauses in some of the precedents under the titles AGREEMENTS and PARTNERSHIP, ante, Vols. 1 and 7.]

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103. COVENANT TO OBTAIN AND ASSIGN PATENT.

103. [COVENANT *to* OBTAIN *and* ASSIGN LETTERS PATENT *for an* INVENTION, *in consideration of a Sum of Money, and delivery of certain number of the Patent Articles.*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*inventor*], of &c., of the one part; and [*purchaser*], of &c., of the other part. WHEREAS the said [*inventor*] hath

Recital of invention.

represented to the said [*purchaser*] that he the said [*inventor*] hath invented (*a*) a new and improved kind of ——, a plan or drawing of which is hereunto annexed. AND WHEREAS the said [*purchaser*] hath contracted with the said [*inventor*] for the purchase of the benefit of the said invention, in the manner

Testatum.

and upon the terms hereinafter expressed. NOW THIS INDENTURE WITNESSETH, that, in consideration of the

In consideration of a sum, and of the purchaser's covenants,

sum of £—— sterling to the said [*inventor*] in hand paid by the said [*purchaser*] at or immediately before the execution of these presents, the receipt whereof is hereby ac-

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(*a*) [The object of framing the recital in this form is to avoid any estoppel upon the purchaser. Vide ante, p. 366; Vol. 7, p. 539.]

103. COVENANT TO OBTAIN AND ASSIGN PATENT.

knowledged, and also in consideration of the covenants hereinafter contained on the part of the said [*purchaser*], he the said [*inventor*] DOTH hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his executors, administrators, and assigns, in manner following, (that is to say), that he the said [*inventor*] will, at any time or times hereafter within the term of fourteen years, to be computed from the day of the date of these presents, upon the reasonable request and at the proper costs and charges of the said [*purchaser*], his executors, administrators, or assigns, take and use all such steps, measures, means, and proceedings, as shall be requisite or proper for obtaining, and use his the said [*inventor*]'s utmost endeavours to obtain, in the name of him the said [*inventor*], her Majesty's letters patent for the sole and exclusive making, using, exercising, and vending of the said invention within such part or parts of the United Kingdom of Great Britain and Ireland, and of the other dominions of her Majesty, as the said [*purchaser*], his executors, administrators, and assigns, may desire, during the term or terms for which patents for inventions are usually granted; AND, after obtaining any such letters patent, will, at the like request, costs, and charges, duly execute and acknowledge, and cause to be inrolled, a sufficient specification of the said invention, according to the terms of such letters patent; AND FURTHER, that the said [*inventor*], his executors or administrators, will or shall, at any time or times after obtaining any such letters patent, upon the reasonable request and at the proper costs and charges of the said [*purchaser*], his executors, administrators, or assigns, make, do, and execute all such assignments, deeds, matters, and things, as the said [*purchaser*], his executors, administrators, and assigns, or his or their counsel in the law, shall reasonably require for assigning and transferring unto the said [*purchaser*], his executors, administrators, and assigns, for his or their absolute use and benefit, the said letters patent, and the full benefit and advantage thereof; AND FURTHER, that he the said [*inventor*] will, at any time or times hereafter, upon every reasonable request of the said [*purchaser*], his executors, administrators, or assigns, more particularly and sufficiently describe to him or them, or his or their agents or work-people, either in writing or by personal explanation and instruction, or otherwise, the nature of the said invention, and in what manner the same,

—inventor covenants with purchaser, to solicit grant of letters patent;

—to inrol specification;

—and to assign letters patent;

—to instruct purchaser in the invention;

103. COVENANT TO OBTAIN AND ASSIGN PATENT.

and every part thereof, and every process relating thereto, are to be performed or carried into effect and used; AND FURTHER, that he the said [*inventor*], his executors or administrators, will not, nor shall any person or persons claiming by, from, through, or under him or them, at any time or times hereafter, during the term of fourteen years to be computed from the day of the date of these presents, without the consent or license of the said [*purchaser*], his executors, administrators, and assigns, either alone or in copartnership, or in any other manner howsoever, directly or indirectly, make or assist in the making of any —— of the new and improved kind hereinbefore mentioned, or in the construction of which the aforesaid invention shall be used; or (except by any specification or specifications which may have to be executed and inrolled under the terms of the said letters patent) describe, either in writing or otherwise, to any person or persons other than the said [*purchaser*], his executors, administrators, or assigns, the nature of the said invention, or in what manner the same is to be performed or carried into effect, or give any information, or do or permit, or be party or privy to, any act, matter, or thing whereby or by means whereof the same respectively may be known by any person or persons other than as aforesaid, or whereby or by means whereof the said [*inventor*] may be prevented or hindered from obtaining the said letters patent for the purposes hereinbefore mentioned; AND FURTHER, that he the said [*inventor*] hath not at any time or times heretofore described, either in writing or otherwise, to any person or persons other than the said [*purchaser*] (*b*), the nature of the said invention, or in what manner the same is to be performed or carried into effect, or given any information, or done or permitted, or been party or privy to, any act, matter, or thing, whereby or by means whereof the same respectively may have been or may be known by any person or persons other than as aforesaid, or whereby or by means whereof he may be prevented or hindered from obtaining the said letters patent for the purposes hereinbefore mentioned; AND LASTLY, that he the said [*inventor*] will, at any time or times hereafter, upon every

—not to use invention without purchaser's license;

—nor, except by specification, to disclose invention;

—that inventor hath not disclosed invention, and is not prevented from obtaining patent;

—for further assurance.

Novelty of invention.

(*b*) [Such a previous disclosure is no objection to the novelty of the invention at the time of the grant of the letters patent. To invalidate the patent on the ground of want of novelty, there must be a prior publication to the world, or public use; ante, Vol. 7, p. 511.]

reasonable request, and at the costs of the said [*purchaser*], his executors, administrators, or assigns, make, do, execute, and perfect all such lawful acts, deeds, disclaimers, amendments, and other matters and things, for the better or more satisfactorily or effectually sustaining or maintaining such letters patent as aforesaid, and assuring the same, and the full benefit thereof, and of the said invention unto the said [*purchaser*], his executors, administrators, and assigns, as by the said [*purchaser*], his executors, administrators, or assigns shall be reasonably required. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the covenants hereinbefore contained on the part of the said [*inventor*], he the said [*purchaser*] DOTH hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*inventor*], his executors and administrators, that he the said [*purchaser*], his executors or administrators, will or shall, within the space of one year, to be computed from the day of the date of the letters patent to be so obtained as aforesaid, at his or their proper costs and charges, make and deliver, or cause to be made and delivered, for and to the said [*inventor*], his executors and administrators, —— complete, perfect, and well made and finished —— of the new and improved kind hereinbefore mentioned; AND will or shall from time to time and at all times hereafter, save, defend, and keep harmless and indemnified the said [*inventor*], his heirs, executors, and administrators, and his and their estates and effects whatsoever and wheresoever, of, from, and against all costs and charges to be incurred or sustained in, about, or in anywise relating to the obtaining of the said letters patent, and the preparing and inrolling of any specification or specifications under the terms thereof, and of, from, and against all claims and demands on account thereof. PROVIDED ALWAYS, and it is hereby agreed and declared, that the solicitor or agent to be employed in obtaining the said letters patent, and in preparing and causing to be inrolled any specification or specifications under the terms thereof, shall be appointed by the said [*purchaser*], his executors, administrators, or assigns; And that the said [*inventor*], his heirs, executors, or administrators, shall not be answerable or accountable for any neglect or default of such solicitor or agent, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. IN WITNESS &c.]

103. COVENANT TO OBTAIN AND ASSIGN PATENT.

Further testatum.

In consideration of premises,

purchaser covenants to make a certain number of articles, and deliver them to the inventor;

—to indemnify inventor from costs of obtaining letters patent and inrolling specification.

Proviso that purchaser is to appoint solicitor or agent, and that inventor shall not be responsible for his default.

104. ASSIGNMENT OF PATENT.

104. [ASSIGNMENT *of* LETTERS PATENT *for an* INVENTION.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part.

Recital of patent;

WHEREAS her Majesty Queen Victoria, by letters patent under the Great Seal of the United Kingdom, dated on or about the —— day of ——, granted unto the said [*vendor*] the sole and exclusive license, power, privilege, and authority, of making, using, and vending a certain [*describe invention*], for the term of fourteen years from the date thereof.

—of specification;

[AND WHEREAS the said [*vendor*] hath represented unto the said [*purchaser*] and doth now declare that, in pursuance of a proviso in the said letters patent contained, he the said [*vendor*] did particularly describe and ascertain the nature of his said invention, and in what manner the same is to be performed by an instrument in writing under his hand and seal, inrolled in due time in her Majesty's High Court of Chancery (*a*); and that the said [*vendor*] was the true and first inventor of the said [*invention*] (*b*), and that the same was, at the time of the granting of the said letters patent, new as to the public use or knowledge thereof within the realm.]

—of contract for sale.

AND WHEREAS the said [*vendor*] hath agreed with the said [*purchaser*] for the absolute sale to him of the said invention and letters patent, and all future bene-

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As to recitals of title.

(*a*) [Vide ante, p. 660, n. These recitals may properly be dispensed with; the statements contained in them fall within the scope of the covenants for title.

[If there has been a disclaimer or memorandum of alteration, say:—

Reference to disclaimer or alteration.

"And, by a certain disclaimer of so much, &c. (*or*, a certain memorandum of alteration, &c.) duly inrolled, on the —— day of ——, with the said specification of the said invention, pursuant to the statute in that behalf made and provided."]

(*b*) [If there has been a disclaimer or alteration, say:—

"as described by the said specification taken in connexion with the said disclaimer, (*or*, memorandum of alteration)"]

104. ASSIGNMENT OF PATENT.

fit and advantage thereof respectively, and of any other letters patent which may be obtained for the said invention, free from incumbrances, at the price of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of £—— sterling by the said [*purchaser*], to the said [*vendor*], already paid, (the receipt whereof is hereby acknowledged), the said [*vendor*] DOTH, by these presents, grant, bargain, sell, and assign unto the said [*purchaser*], his executors, administrators, and assigns, ALL THOSE the invention and letters patent hereinbefore mentioned, and the privileges by the said letters patent granted; And all future and other letters patent or privileges, either at home or abroad, or extension of the said letters patent, or of the privileges thereby granted, for or in respect of the said invention; And the exclusive use and benefit, exercise and enjoyment of the said invention and privilege; And all rights, powers, authorities, privileges, advantages, profits, emoluments, and benefits, to the said letters patent, invention, and premises, or any of them, in anywise appertaining or belonging; And all the right, title, interest, term and terms of years, benefit, property, advantage, claim, and demand, whatsoever, both at law and in equity, of him the said [*vendor*], in, to, of, or upon the said letters patent and premises, or any of them. TO HAVE, HOLD, USE, EXERCISE, AND ENJOY the said letters patent, invention, and premises, unto and by the said [*purchaser*], his executors, administrators, and assigns, henceforth for all the residue of the said term of fourteen years now unexpired, and for all other the term or terms which the said [*vendor*] may now have, or which may hereafter be granted or obtained therein, in as full, ample, and beneficial a manner as the said [*vendor*] might have done if these presents had not been made. AND the said [*vendor*] for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*purchaser*], his executors, administrators, and assigns, that the said [*vendor*], at the time of the sealing of the said letters patent, was the true and first inventor of the said invention; and that the same then was new as to the public use or knowledge thereof within the realm; *And also*, that, in pursuance of the proviso for that purpose contained in the said letters patent, he the said [*vendor*] did particularly describe and ascertain the nature of his said invention, and in what manner the same is to be performed, by an instrument in writing, under his hand and seal, duly inrolled in

Testatum.

Vendor assigns patent.

Habendum.

Covenants by vendor that he was the true and first inventor;

—that specification was valid;

104. ASSIGNMENT OF PATENT.

her Majesty's High Court of Chancery (*c*); *And that* the said letters patent, expressed to be hereby assigned, are good, valid, and effectual for the said invention, and are in nowise invalidated, avoided, or voidable; *And that* the said [*vendor*] now hath in himself good right and full power and authority by these presents to assign the said letters patent, invention, and premises unto the said [*purchaser*], his executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents; *And that* the said letters patent, privileges, invention, and premises, respectively, shall from henceforth be held, used, exercised, and enjoyed, during the term or terms aforesaid by the said [*purchaser*], his executors, administrators, or assigns, without any lawful denial, interruption, hinderance, prevention, or disturbance, by any person or persons whomsoever; *And lastly*, that the said [*vendor*], his executors and administrators, and all other persons having or lawfully claiming any right, title, interest, or authority, whatsoever, either at law or in equity, in or in respect of the said letters patent and premises, or any of them, will and shall, from time to time and at all times hereafter, upon every reasonable request and at the costs of the said [*purchaser*], his executors, administrators, or assigns, make, do, and execute all such further acts, deeds, applications, petitions, assurances, matters, and things, whatsoever, for the better and more effectually assigning, assuring, confirming, or extending the said letters patent, invention, privileges, term or terms of years, and premises, or any of them, or the enjoyment thereof, respectively, unto or for the benefit of the said [*purchaser*], his executors, administrators, or assigns, or for enabling him, them, or any of them, to prevent, or to commence, bring, or prosecute any actions, suits, or other proceedings in respect of, any infringement or infringements of the said privileges and premises intended to be hereby assured, or otherwise to secure to him and them the sole and exclusive use and enjoyment of the said invention and premises, as by the said [*purchaser*], his executors, administrators, or assigns, shall be devised and required. IN WITNESS &c.]

that patent is valid;

—for right to assign;

—for quiet enjoyment;

—for further assurance.

Disclaimer or alteration.

(*c*) "and by a certain disclaimer of so much, &c., (*or*, memorandum of alteration, &c.), duly inrolled on the —— day of ——, with the said specification, pursuant to the statute in that behalf made and provided."]

105. [ASSIGNMENT *of the* COPYRIGHT *of a* BOOK. *Variation when the* ASSIGNMENT *is made by* ENTRY AT STATIONERS' HALL, *and the present Deed contains the* COVENANTS FOR TITLE, &c. 105. ASSIGNMENT OF COPYRIGHT.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part. [WHEREAS the said [*vendor*] is the [author and] proprietor of the absolute copyright of a book or work, intituled &c.; and hath agreed with the said [*purchaser*] for the absolute sale to him of the said copyright, free from incumbrances, at the price of £——. NOW THIS INDENTURE] WITNESSETH, that, [in pursuance of the said agreement and] in consideration of the sum of £—— sterling by the said [*purchaser*] to the said [*vendor*] already paid, (the receipt whereof is hereby acknowledged), the said [*vendor*] doth hereby grant, bargain, sell, and assign unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT the absolute copyright of and sole privilege of printing all that [the said] book or work intituled &c.; And all the right, title, interest, property, claim, and demand whatsoever of him the said [*vendor*], to, in, or upon the same, and all future impressions of the said work. TO HAVE, HOLD, EXERCISE, AND ENJOY the said copyright and premises unto the said [*purchaser*], his executors, administrators, and assigns, henceforth during the residue of the term of the said copyright now unexpired, for his and their own use and benefit, [but subject always to such right as may now be subsisting in the publisher or proprietor of the last edition of the said book or work to prevent the publication of any future edition of the same until such last edition shall be out of print (*a*).] AND the said [*vendor*], for himself, his heirs,

Parties.

Recital of title and contract.

Testatum.

Vendor assigns copyright.

Habendum.

(*a*) [The rights of the proprietor of a single edition of a work, and the precise meaning of the expression "out of print," have never been determined, and may be made the subject of many difficult questions. See *Sweet* v. *Cater*, 11 Sim. 572, ante, Vol. 7, p. 641. It seems to be better to adopt the ordinary language of the trade than to attempt the very difficult task of defining the circumstances under which an edition may be said to be out of print.]

As to sale of an edition of a book.

105. ASSIGNMENT OF COPYRIGHT.

executors, and administrators (*b*), doth hereby covenant with the said [*purchaser*], his executors, administrators, and assigns, that he the said [*vendor*], hath good right and lawful authority by these presents to assign and assure the said copyright and premises unto the said [*purchaser*], his executors, administrators, and assigns, in manner aforesaid, free from all incumbrances whatsoever, according to the true intent and meaning thereof (*c*); *And that* the same shall and may henceforth, during the residue of the said term, be held, exercised, and enjoyed accordingly by the said [*purchaser*], his executors, administrators, and assigns, without any lawful interruption, invasion, or disturbance; *And that* from time to time, and at any time or times hereafter, upon every request and at the costs of the said [*purchaser*], his executors, administrators, or assigns, such further and other acts, deeds, assurances, matters, and things, shall be executed for the better and more effectually or satisfactorily assigning or assuring the said copyright and premises unto the said [*purchaser*], his executors, administrators, and assigns, as he or they shall reasonably request. IN WITNESS &c.]

Vendor covenants for right to assign,

—for quiet enjoyment,

—and for further assurance.

Covenant when vendor is not the author.

(*b*) [If the vendor is not the author, qualify the covenants by inserting here:—

"and for and against the acts and defaults only of himself, and of all persons claiming or to claim by, from, through, or under him."]

Variation where assignment is made by entry at Stationers' Hall.

(*c*) [If the assignment is made by entry at Stationers' Hall, pursuant to the stat. 5 & 6 Vict. c. 45, s. 13, (ante, Vol. 7, p. 610), by which means the ad valorem stamp will be saved, (ante, Vol. 7, p. 610, n. (*c*)), in place of the recitals and operative part down to this point, say:—

Recital of registered title;

"WHEREAS the said [*vendor*], being registered in the registry-book of the Stationers' Company in the City of London as the proprietor of a certain book or work, intituled &c., (the first edition whereof was published on the —— day of ——), did lately contract with the said [*purchaser*] for the sale to him of the absolute copyright of the said book or work for the price of £—— sterling, which price or sum has been duly paid by the said [*purchaser*] to the said [*vendor*], as he doth hereby acknowledge. AND WHEREAS, by an entry made on or about the day of the date of these presents in the registry-book of the said Stationers' Company, upon the requisition of the said [*purchaser*], with the concurrence of the said [*vendor*], the said copyright was absolutely assigned

—of sale and assignment to purchaser.

105. ASSIGNMENT OF COPYRIGHT.

unto the said [*purchaser*], his executors, administrators, and assigns, thenceforth for the residue of the term thereof then subsisting, or was intended to be so assigned. NOW THIS INDENTURE WITNESSETH, that the said [*vendor*], for himself, his heirs, executors, and administrators, [*if not the author, add,* and for and against the acts and defaults only of himself, and of all persons claiming or to claim by, from, through, or under him], DOTH hereby covenant with the said [*purchaser*], his executors, administrators, and assigns, that, at the time of making such entry, or of requiring the same to be made, as aforesaid, he the said [*vendor*] had good and lawful authority thereby to assign and assure the said copyright unto the said [*purchaser*], his executors, administrators, and assigns, free from all incumbrances, to hold and enjoy the same unto and by the said [*purchaser*], his executors, administrators, and assigns, thenceforth during the residue of the term thereof; *And that*" &c., *ut supra.*]

Testatum.

Vendor covenants for title, &c.

106. [ASSIGNMENT *of the* COPYRIGHT *of a published Book and* MANUSCRIPT CONTINUATIONS *and* ADDITIONS, *and of a Book in MS., by the* ADMINISTRATOR *of the deceased Author* (*a*).

106. COPYRIGHT AND MANUSCRIPT ADDITIONS, BY ADMINISTRATOR.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of the other part. WHEREAS [*author*], late of &c., and now

Parties.

(*a*) [The evidence of an author's title to the copyright of an existing work is more defective than that to any other species of property. The thing itself is intangible and incapable of delivery; it is not created, nor is its existence necessarily manifested, by any deed or written document, and there is no compulsory registry of title. Vide ante, Vol. 7, pp. 609, 610, 638. The consequence is, that no purchaser can be secure from a prior assignment, and where the author is in straitened circumstances, and is unable to meet with a purchaser who has confidence in his character, the sale of his works is either conducted under great disadvantage, or is rendered impracticable. As the *legal* title passes by an assignment, the remedy is beyond the jurisdiction of equity, which might otherwise, with no unexampled stretch of authority, have devised

As to evidence of title to copyright.

Danger of purchasing copyright.

106. COPYRIGHT AND MANUSCRIPT ADDITIONS, BY ADMINISTRATOR.

deceased, was the author of a book or work intituled &c., which was published in or about the year ——. And whereas the said [*author*] did at various times make divers additions to, and continuations, alterations, and corrections, of the said work. And whereas the said [*author*] was also the author of a certain work, or part of a work, still in manuscript, being &c. And whereas the said [*author*] died in the year ——, intestate. And whereas in the month of ——, letters of administration of the estate and effects of the said [*author*], deceased, were duly granted to the said [*vendor*] by the Prerogative Court of the Archbishop of Canterbury. And whereas, the said [*vendor*] hath agreed with the said [*purchaser*] for the sale to him of the hereinbefore-mentioned works and manuscripts, with the said several additions, continuations, alterations, and corrections thereto and thereof, and the absolute copyright thereof, free from incumbrances, for the price of £—— sterling. NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £——, by the said [*purchaser*] to the said [*vendor*], already paid, the said [*vendor*] *Doth* hereby bargain, sell, assign, transfer, and set over unto the said [*purchaser*], his executors, administrators, and assigns, All that the aforesaid book or work of the aforesaid [*author*], deceased, intituled &c., and all the additions, continuations, alterations, and corrections, whether in manuscript or printed, unpublished or already published, thereto and thereof at any time or times made by the said [*author*], deceased; *And also, all that* the unpublished manuscript or work, or part of a work, of the said [*author*], deceased, being &c.; And all and every the papers whereon the last-mentioned work, or the aforesaid additions, continuations, and corrections, or any of them, respectively, (being in manuscript), are, or is written; And all the right, title, term, and interest, and the full, absolute, and unincumbered copyright and privilege, both at law and in equity, late of the said [*author*], deceased; And all the

Recitals of authorship, publication, and additions in manuscript, &c.;

—death of author, letters of administration;

—contract for sale.

Testatum.

Vendor assigns

copyright and manuscript work and additions.

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a rule similar to that created in the cases of *Dearle* v. *Hall*, and *Loveridge* v. *Cooper*, (ante, Vol. 5, p. 458), and capable of affording tolerable security in the majority of cases. It is to be hoped that the legislature will speedily interfere by establishing a compulsory registry of the title to copyrights. In the meantime, it will of course be proper to search the registry at Stationers' Hall previously to completing any purchase, and to cause the purchase, when completed, to be registered.]

106. COPYRIGHT AND MANUSCRIPT ADDITIONS, BY ADMINISTRATOR.

estate, right, title, interest, property, benefit, claim, and demand, both at law and in equity, of him the said [*vendor*], in, to, or of the said several works, additions, continuations, alterations, corrections, papers, manuscripts, and premises, and each and every of them, with their several and respective appurtenances. TO HAVE, HOLD, EXERCISE, AND ENJOY the said several copyrights and premises, unto and by him the said [*purchaser*], his executors, administrators, and assigns, from time to time, and at all times henceforth as and for his and their own absolute property and right, and to and for his and their sole use and benefit. AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*purchaser*], his executors, administrators, and assigns, that he the said [*vendor*] hath not at any time made, done, committed, suffered, or been party or privy to or conusant of, any act, deed, matter, or thing, whereby or by means whereof the said copyrights and premises, or any of them, or any part thereof, respectively, are, is, can, shall, or may be charged, impeached, incumbered, or prejudicially affected in any manner. *And that* he the said [*vendor*], his executors, administrators, and assigns, will and shall, from time to time, and at any time or times henceforth, upon every reasonable request, and at the costs of the said [*purchaser*], his executors, administrators, or assigns, make, do, and execute, or procure to be made, done, and executed, all lawful acts, deeds, assurances, matters, and things, whatsoever, for the more effectually and absolutely assigning and vesting the said copyrights and premises to and in the said [*purchaser*], his executors, administrators, or assigns. IN WITNESS &c.]

Habendum.

Vendor covenants against incumbrances;

—and for further assurance.

Here closes the title PURCHASE DEEDS. If it be thought that the space assigned to this head is scarcely commensurate with its importance, it must be remembered that it has been deprived of some portion of its contents by the anticipating encroachment of former titles. Precedents of deeds assigning shares in ships, canal shares, reversionary interests in stock, judgments, &c., will be found under the title "MORTGAGES," which might be easily converted into absolute assignments to a purchaser, by the introduction of alterations corresponding with those which distinguish the precedent of the assignment of a bond and policy of assurance under the present title, (vide ante, pp. 640, 644), from an assignment of a bond and of a policy of assurance to a mortgagee. It seemed, therefore, unnecessary to repeat them here. Precedents of assignments of annuities will be found, ante, Vol. 2, pp. 123—172.

Conclusion of the title "Purchase Deeds."

STAMPS ON CONVEYANCES.

STAMPS ON CONVEYANCES.

48 Geo. 3, c. 149, s. 22.

On the sale of any property, the purchase or consideration-money shall be fully and truly set forth in the conveyance, &c.

[The stat. 48 Geo. 3, c. 149, s. 22, enacts, That, "in all cases of the sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, or claim, in, to, out of, or upon any lands, tenements, rents, annuities, or other property, where a duty is imposed on the conveyance thereof, in the schedule hereunto annexed, in proportion to the amount of the purchase or consideration-money therein or thereupon expressed, the full purchase or consideration-money, which shall be directly or indirectly paid, or secured or agreed to be paid for the same, shall be truly expressed and set forth in words at length, in or upon the principal or only deed or instrument whereby the land or other thing sold shall be granted, assigned, transferred, released, renounced, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction; and also where, upon the sale of any annuity, easement, servitude, or other right, not before in existence, the same shall not be created by actual grant, or conveyance, but shall only be secured by bond, warrant of attorney, covenant, contract, or other security, the full purchase or consideration-money, which shall be directly or indirectly paid, or secured, or agreed to be paid for the same, shall be truly expressed and set forth, in words at length, in or upon the bond or other instrument or instruments, by which the same shall be secured." And the act imposes penalties on purchasers and sellers for default in setting forth the consideration.

[Sect. 24 enacts, that, where the consideration shall not be truly set forth, the purchaser may recover back so much of the consideration-money as shall not be stated.

[Sect. 25 imposes penalties on attornies, solicitors, and others, for not inserting the full and true consideration in any conveyance, &c.

Regulations to be observed on surrendering copyhold lands in court.

[Sect. 30 enacts, that, "where any copyhold or customary lands or hereditaments shall be proposed to be surrendered in court, the person or persons, proposing to surrender the same, shall deliver to the steward of the manor or honour, whereof such lands or hereditaments shall be holden, a note in writing, stating whether the surrender proposed is upon a sale or not upon a sale, and, in the former case, specifying the amount of the purchase or consideration-money, agreed upon for such lands or hereditaments, to the intent that the same may be inserted and set forth, in words at length, in or upon the copy of court-roll, to be afterwards made out of such surrender, pursuant to the directions of this act; and, until such note in writing shall be delivered, the lord or lady, or steward, of the manor or honour, shall not accept or take the proposed surrender;" and imposes penalties for default.]

EXTRACT FROM STAT. 55 GEO. 3, c. 134. SCHED. PART I.

STAMPS ON CONVEYANCES.

CONVEYANCE, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, *upon the sale* of any lands, tenements, rents, annuities, or other property (*a*), real or personal, heritable or moveable, or of any right, title, interest, or claim, in, to, out of, or upon any lands, tenements, rents, annuities, or other property; that is to say, for and in respect of *the principal or only deed, instrument, or writing*, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser or purchasers, or any other person or persons, by his, her, or their direction;

Ad valorem duty.

Where the purchase or consideration-money therein or thereupon expressed shall not amount to 20*l.*		£0	10	0
And where the same shall amount to—				
20*l.* and not amount to	50*l.*	1	0	0
50*l.*	150*l.*	1	10	0
150*l.*	300*l.*	2	0	0
300*l.*	500*l.*	3	0	0
500*l.*	750*l.*	6	0	0
750*l.*	1,000*l.*	9	0	0
1,000*l.*	2,000*l.*	12	0	0
2,000*l.*	3,000*l.*	25	0	0
3,000*l.*	4,000*l.*	35	0	0
4,000*l.*	5,000*l.*	45	0	0
5,000*l.*	6,000*l.*	55	0	0
6,000*l.*	7,000*l.*	65	0	0
7,000*l.*	8,000*l.*	75	0	0
8,000*l.*	9,000*l.*	85	0	0
9,000*l.*	10,000*l.*	95	0	0
10,000*l.*	12,500*l.*	110	0	0
12,500*l.*	15,000*l.*	130	0	0
15,000*l.*	20,000*l.*	170	0	0
20,000*l.*	30,000*l.*	240	0	0
30,000*l.*	40,000*l.*	350	0	0
40,000*l.*	50,000*l.*	450	0	0
50,000*l.*	60,000*l.*	550	0	0
60,000*l.*	80,000*l.*	650	0	0
80,000*l.*	100,000*l.*	800	0	0
100,000*l.* or upwards		1000	0	0

Stamp duties on transfers of ships repealed.

(*a*) [By stat. 6 Geo. 4, c. 41, s. 1, it was enacted, "that all stamp duties then payable in Great Britain and Ireland respectively, upon or in respect of any bill of sale, or any conveyance, assignment, or other deed or instrument whatever, for the sale, transfer, or other disposition, either absolutely or by way of mortgage, or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel," should cease and be no longer payable. See *Meering* v. *Duke*, 2 Man. & Ry. 121.]

STAMPS ON CONVEYANCES.

Feoffment.

Bargain and sale inrolled.

And where any freehold lands or hereditaments in England shall be conveyed by a deed of feoffment, with or without any letter or letters of attorney therein contained to deliver or receive seisin, or by a deed of *bargain and sale inrolled;* such deed of feoffment or bargain and sale, unless accompanied with a lease and release, shall be charged with a *further* duty as follows:

If the purchase or consideration-money therein or thereupon expressed shall be under 20*l.* £0 10 0

If it shall amount to—

20*l.* and not amount to 50*l.*	0	15 0
50*l.* ——————— 150*l.*	1	0 0
150*l.* or upwards	1	15 0

Feoffment *and* bargain and sale.

But if there shall be both a feoffment and a bargain and sale inrolled, then the said further duty shall not attach on either.

Consideration to be set forth.

Note.—The purchase or consideration-money is to be truly expressed and set forth in words at length, in or upon every such principal or only deed or instrument of conveyance.

Apportionment of consideration.

And where any lands or other property, of different tenures or holdings, or held under different titles, contracted to be sold at one entire price for the whole, shall be conveyed to the purchaser in separate parts or parcels, by different deeds or instruments, the purchase or consideration-money shall be divided and apportioned in such manner as the parties shall think fit, so that a distinct price or consideration for each separate part or parcel may be set forth in or upon the principal or only deed or instrument of conveyance relating thereto; which shall be charged with the said ad valorem duty in respect of the price or consideration-money therein set forth.

Joint purchase and separate conveyances.

And where any lands or other property, contracted to be purchased by two or more persons jointly, or by any person for himself and others, or wholly for others, at one entire price for the whole, shall be conveyed, in parts or parcels, by separate deeds or instruments, to the persons for whom the same shall be purchased, for distinct parts or shares of the purchase-money; the principal or only deed or instrument of conveyance, of each separate part or parcel, shall be charged with the said ad valorem duty, in respect of the sum of money therein specified as the consideration for the same.

Joint purchase, purchase and conveyance.

But if separate parts or parcels of such lands or other property shall be conveyed to, or to the use of, or in trust for different persons, in and by one and the same deed or instrument, then such deed or instrument shall be charged with the said ad valorem duty, in respect of the aggregate amount of the purchase or consideration-monies therein mentioned to be paid, or agreed to be paid, for the lands or property thereby conveyed.

Sub-sale.

And where any person, having contracted for the purchase of any lands or other property, but not having obtained a conveyance thereof, shall contract to sell to any other person, and the same shall in consequence be conveyed immediately to the sub-purchaser, the principal or only deed or instrument of conveyance shall be charged with the said ad valorem duty, in respect of the purchase or consideration-money therein mentioned to be paid, or agreed to be paid, by the sub-purchaser.

Sub-sale and

And where any person, having contracted for the purchase of any

lands or other property, but not having obtained a conveyance thereof, shall contract to sell the whole, or any part or parts thereof, to any other person or persons, and the same shall in consequence be conveyed by the original seller to different persons, in parts or parcels, the principal or only deed or instrument of conveyance, of each part or parcel thereof, shall be charged with the said ad valorem duty, in respect only of the purchase or consideration-money which shall be therein mentioned to be paid, or agreed to be paid, for the same by the person or persons to whom, or to whose use, or in trust for whom, the conveyance shall be made, without regard to the amount of the original purchase-money.

conveyances in parcels.

And in all cases of such sub-sales as aforesaid, the sub-purchasers, and the persons immediately selling to them, shall be deemed and taken to be the purchasers and sellers, within the intent and meaning of the provisions and regulations of the aforesaid act of the forty-eighth year of his Majesty's reign, relating to the ad valorem duties on conveyances on the sale of property, thereby imposed, and which are to be observed and enforced with regard to the said ad valorem duties hereby granted.

Who to be deemed sellers and purchasers on sub-sales. 48 Geo. 3, c. 149.

But where any sub-purchaser shall take an actual conveyance of the interest of the person immediately selling to him, which shall be chargeable with the said ad valorem duty in respect of the purchase or consideration-money paid or agreed to be paid by him, and shall be duly stamped accordingly, any deed or instrument of conveyance to be afterwards made to him, of the property in question, by the original seller, shall be exempted from the said ad valorem duty, and be charged only with the ordinary duty on deeds or instruments of the same kind not upon a sale.

Conveyance by original vendor after conveyance by mesne vendor.

And where any lands or other property separately contracted to be purchased of different persons, at separate and distinct prices, shall be conveyed to the purchaser, or as he shall direct, in and by one and the same deed or instrument, such deed or instrument shall be charged with the said ad valorem duty, in respect of the aggregate amount of the purchase or consideration-monies therein mentioned to be paid or agreed to be paid for the same.

Several sales to one purchaser and one conveyance.

And where any lands or other property shall be sold and conveyed, in consideration, wholly or in part, of any sum of money charged thereon by way of mortgage, wadset, or otherwise, and then due and owing to the purchaser, or shall be sold and conveyed, subject to any mortgage, wadset, bond, or other debt, or to any gross or entire sum of money, to be afterwards paid by the purchaser, such sum of money or debt shall be deemed the purchase or consideration-money, or part of the purchase or consideration-money, as the case may be, in respect whereof the said ad valorem duty is to be paid.

Purchase of mortgaged property.

And to prevent doubts respecting what shall be deemed the principal deed or instrument of conveyance, in certain cases, it is hereby declared:

Principal instrument:—

That, where any lands or hereditaments in England shall be conveyed by bargain and sale inrolled, and also by lease and release, or feoffment, with or without any such letter or letters of attorney therein contained as aforesaid, the release or feoffment shall be deemed the principal deed; and the bargain and sale shall be charged only with the duty hereby

bargain and sale, *and* lease and release or feoffment;

STAMPS ON CONVEYANCES.

imposed on deeds in general. (*See Deed*). But the same shall not be inrolled or be available, unless also stamped for testifying the payment of the ad valorem duty on the release or feoffment.

lease and release, *and* feoffment;

And where any lands or hereditaments shall be conveyed by lease and release, and also by feoffment, with or without any such letter or letters of attorney therein contained as aforesaid, the release shall be deemed the principal deed; and the feoffment shall be charged only with the duty hereby imposed on deeds in general. (*See Deed*). But the same shall not be available, unless also stamped for testifying the payment of the ad valorem duty on the release.

bargain and sale, &c. of copyholds without surrender;

And where any copyhold or customary estate shall be conveyed, by a deed of bargain and sale, by the commissioners named in a commission of bankrupt, or by executors or others, by virtue of a power given by will, or by act of Parliament, or otherwise, where a surrender shall not be necessary, the deed of bargain and sale shall be deemed the principal instrument.

surrender or grant of copyholds.

And in other cases of copyhold or customary estates, the surrender or voluntary grant, or the memorandum thereof respectively, if made out of Court, or the copy of court-roll of the surrender or voluntary grant, if made in Court, shall be deemed the principal instrument.

Copies of court-roll.

And copies of court-roll, made after the 31st day of August, 1815, of surrenders and voluntary grants made in Court before or upon that day, and subsequent to the 10th day of October, 1808, shall be charged with the said ad valorem duties. But copies of court-roll of surrenders and voluntary grants made before or upon the 10th day of October, 1808, shall not be liable thereto.

Grants for lives.

And grants and copies of court-roll of grants of copyhold or customary estates for a life or lives are to be charged, as well as those for any greater interest.

And where, in Scotland, there shall be a disposition or assignation executed by the seller, and any other instrument or instruments, writing or writings, to complete the title, the disposition or assignation shall be deemed the principal instrument.

Sale of annuity or other *new right.*

And where, *upon the sale of any annuity, or other right not before in existence*, the same shall not be created by actual grant or conveyance, but shall only be secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument by which the same shall be secured, or some one of such instruments, if there be more than one, shall be deemed and taken to be liable to the same duty as an actual grant or conveyance.

Leases.

And in the case of leases or tacks, where a yearly rent of 20*l.* or upwards shall be reserved as part of the consideration for the same, there shall be charged a further duty; for which, see title "LEASE."

Progressive duty.

And where the principal or only deed or instrument of conveyance, together with any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, shall contain 2160 words, or upwards, then, for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further *progressive* duty of ..... 1*l.*

Several instruments.

And where there shall be several deeds, instruments, or writings, for completing the title to the property sold, such of them as are not liable to the said ad valorem duty shall be charged with the duty to which

the same may be liable under any general or particular description of such deeds, instruments, or writings contained in this schedule.

Principal instrument in cases not expressly provided for.

And where, *in any case not hereby expressly provided for*, of several deeds, instruments, or writings, a doubt shall arise which is the principal, it shall be lawful for the parties to determine for themselves which shall be so deemed, and to pay the said ad valorem duty thereon accordingly; and, if necessary, the other deeds, instruments, or writings, on which the doubt shall have arisen, shall be stamped with a particular stamp for denoting or testifying the payment of the ad valorem duty, upon all the deeds or instruments being produced, and appearing to be duly stamped in other respects.

Duplicate instruments.

And where there shall be duplicates of any deed or instrument, chargeable with the said ad valorem duty, exceeding 2*l.*, one of them only shall be charged therewith, and the other or others shall be charged with the ordinary duty on deeds or instruments of the same kind not upon a sale; and on the whole being produced duly stamped, as hereby required, the latter shall also be stamped with a particular stamp for denoting or testifying the payment of the said ad valorem duty.

Matter not incident to the sale.

And where any deed or instrument, operating as a conveyance on the sale of any property, shall operate also as a conveyance of any other than the property sold by way of settlement, or for any other purpose, or shall also contain any other matter or thing besides what shall be incident to the sale and conveyance of the property sold, or relate to the title thereto; every such deed or instrument shall be charged, in addition to the duty to which it shall be liable as a conveyance on the sale of property, and to any progressive duty to which it may also be liable, with such further stamp duty as any separate deed, containing the other matter, would have been chargeable with, exclusive of the progressive duty.

Exemptions from the preceding Duties on Conveyances upon the Sale of Lands, &c.

Exemptions.

Copyholds of small value.

All surrenders and other instruments, relating only to copyhold or customary estates, whose clear yearly value shall not exceed 20s.; but which are hereinafter otherwise charged.

Transfers of Bank, South Sea, and East India stock.

All transfers of shares in the stock and funds of the Governor and Company of the Bank of England, and of the South Sea and East India Companies; but which are hereinafter otherwise charged.

Leases.

All leases and tacks in consideration of a fine or grassum, for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, by whomsoever granted.

All leases in consideration of a fine for a term absolute, not exceeding twenty-one years, granted by ecclesiastical corporations, aggregate or sole.

Voluntary grants of copyholds for lives.

And all voluntary grants made by the lord or lady of any manor of any copyhold or customary lands or hereditaments for a life or lives, for a pecuniary consideration, and the copies of court-roll of such voluntary grants.

All which leases, tacks, grants, and copies, are hereinafter charged with ordinary duty.

STAMPS ON CONVEYANCES.

Exemptions.

Exemptions from the preceding and all other Stamp Duties, except the Duty on the Receipt for the Consideration-Money.

Conveyances of rents purchased under the act of the 34th year of his Majesty's reign, c. 75, for the better management of the land revenue of the Crown, and for the sale of fee farm and other unimproveable rents, upon subsequent sales thereof by the purchasers or their heirs or assigns, to the owners of the lands or other hereditaments, out of which the same are payable; where the consideration-money to be paid on such subsequent sales shall not exceed the sum of 10*l.*

Exemptions from the preceding and all other Stamp Duties.

Transfers of government stock.

All transfers of shares in any of the government or parliamentary stocks or funds.

For other exemptions, see the titles GRANT, LEASE, and at the end of this part of the schedule.

CONVEYANCE of lands and rents belonging to the Crown. See GRANT.

CONVEYANCE of any estate or property in trust for sale, which shall be intended only as a security for money or stock. See MORTGAGE.

CONVEYANCE of the equity or right of redemption or reversion of lands or other property to a purchaser, in the same deed with a mortgage, wadset, or other security made thereupon. *See* MORTGAGE.

CONVEYANCE of any kind whatever, *not otherwise charged in this schedule, nor expressly exempted from all stamp duty*.....1*l.* 15*s.*

Progressive duty.

And where the same, together with any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, shall contain 2160 words, or upwards, then, for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further *progressive* duty of .....1*l.* 5*s.*

Copies of agreements, deeds, &c.

COPY, attested to be a true copy, in the form which hath been commonly used for that purpose, or in any other manner authenticated or declared to be a true copy, or made for the purpose of being given in evidence as a true copy, of any agreement, contract, bond, deed, or other instrument of conveyance, or any other deed whatever, together with any schedule, receipt, or other matter put or indorsed thereon or annexed thereto, or of any part thereof respectively.

Where such a copy shall be made for the security or use, of any person being a party to, or taking any benefit or interest immediately under, such agreement, contract, bond, deed, or other instrument (*b*). } *The same duty or duties as for the original instrument.*

Evidence by copy.

(*b*) [See *Ditcher* v. *Kendrick*, 1 Car. & P. 161, where an attested copy stamped with a 1*s.* stamp was held to be admissible as secondary evidence. In *Braythwayte* v. *Hitchcock*, 10 Mee. & W. 494, evidence by production of an unstamped copy of a deed, by a witness who swore that he had examined it with the original, was admitted, after notice to the opposite party to produce the original.]

And where any such copy shall be made for the security or use of any person not being a party to, or taking any benefit or interest immediately under, such agreement, contract, bond, deed, or other instrument ..... 1*s.*

And for every entire quantity of 720 words contained therein, over and above the first 720 words, a further *progressive* duty of..... 1s.

And all copies which shall at any time be offered in evidence shall be deemed to have been made for that purpose.

Exemptions from the preceding and all other Stamp Duties.

Exemptions.

All copies attested or authenticated as aforesaid, which shall be made for the private use only of any person having the custody of the original instruments, or of his or her counsel, attorney, or solicitor.

Copy for private use of person having original.

COPY, attested or authenticated as aforesaid, or made for the purpose of being given in evidence as a true copy of any original will, testament, or codicil, or of the probate or probate copy of any will or codicil, or of any letters of administration, or of any confirmation of a testament, testamentary or dative, or of any part thereof respectively ..... 1*s.*

Copy of will, probate, or letters of administration.

And for every entire quantity of 720 words contained in any such copy over and above the first 720 words, a further *progressive* duty of.....1*s.*

And all copies which shall at any time be offered in evidence shall be deemed to have been made for that purpose.

Office COPY or extract of any will or codicil deposited in any ecclesiastical court in England ..... 1*s.*

Office copy of will.

And for every entire quantity of 90 words contained in any such copy or extract, over and above the first 90 words, a further *progressive* duty of ..... 1*s.* (*c*)

COPY or extract of any memorial, or of the register of any memorial, registered pursuant to any act of Parliament made or to be made for the public registering of deeds and conveyances in England ..... 5*s.*

Copy of memorial for registry.

And for every piece of vellum, parchment, or paper upon which any such copy or extract shall be written after the first, a further *progressive* duty of.....5*s.*

COPY or extract of any deed, or of any other instrument *not falling under the description of law proceedings*, which shall be made or taken from the rolls or records of any of his Majesty's courts at Westminster ..... 2*s.*

Copy of recorded deed, &c.

And for every piece of vellum, parchment, or paper upon which any such copy or extract shall be written, after the first, a further *progressive* duty of.....2*s.*

(*c*) [The duties on *office* copies of wills (but not those on *attested* copies) are repealed by stat. 5 Geo. 4, c. 41, s. 1.]

STAMPS ON CONVEYANCES.

Certain receipts exempted from duty.

[Among the exemptions from the duties imposed in the schedule on receipts, are—"*Receipts or discharges indorsed* (*d*) *or otherwise written upon or contained in any bond, mortgage, or other security, or any conveyance, deed, or instrument whatsoever, duly stamped according to the laws in force at the date thereof, acknowledging the receipt of the consideration-money therein expressed, or the receipt of any principal money, interest or annuity thereby secured.*"

"*Releases or discharges for money, by deeds duly stamped according to the laws in force at the date thereof.*"

(*d*) [The unstamped indorsement may be read in evidence as a receipt, although it contains matter of agreement which would require a stamp. *Odye* v. *Cookney*, 1 M. & Rob. 517. See *Grey* v. *Smith*, 1 Camp. 387. And if the back of the deed is already filled with other indorsements, a receipt on paper annexed to the deed is within the exemption. *Orme* v. *Young*, 4 Camp. 336; Holt, N. P. C. 84.]

REGISTRY.

PRELIMINARY REMARKS.

MEMORIALS UNDER THE REGISTRY ACTS.

BY various acts of Parliament, memorials of deeds affecting lands in the counties of Middlesex and York, and the county of the town of Kingston-upon-Hull, are for certain purposes required to be registered (*a*).

Middlesex Registry.

Stat. 7 Ann. c. 20.

Memorials of deeds and wills affecting lands in Middlesex to be registered;

The stat. 7 Ann. c. 20, s. 1, enacts, "that a memorial of all deeds and conveyances which, from and after the 29th September, 1709, shall be made and executed, and of all wills and devises in writing, made or to be made and published, where the devisor or testatrix shall die after the said 29th September, of or concerning and whereby any honors, manors, lands, tenements, or hereditaments, in the said county [of Middlesex] may be any way affected in law or equity, may be registered in such manner as is hereinafter directed (*b*);

(*a*) By the Bedford Level Act, 15 Car. 2, c. 17, all conveyances and charges, except leases for seven years, of the ninety-five thousand acres therein comprised, are required to be registered. As to the effect of such registry, see *Willis* v. *Brown*, 10 Sim. 127. The other acts relating to the Bedford Level, are stat. 11 Geo. 3, c. 78; 36 Geo. 3, c. 73; 1 & 2 Geo. 4, c. 64. [See *Hodson* v. *Sharpe*, 10 East, 350. The practice is to register the instrument at full length. No authentication is required, and the registry does not include wills. See 2nd Real P. R. App. 584.]

(*b*) More of the deed is usually set forth in the memorial than the act requires; indeed the practice of the registry-office in many respects is not strictly conformable to the requisitions of the act. The discrepancies have been pointed out by Sir Edward Sugden with his usual ability, see 3 Vend. & Purch. 346. Where the practice requires something which the act does not, there is the less reason for objection, (if a compliance with it in the particular case be feasible), than where it falls short of the legislative requisition; in which case, a memorial received at the office may yet be unavailing for the purposes of the act; for it is scarcely necessary to observe, that the reception of the memorial is by no means conclusive evidence of its sufficiency, though, in points admitting of doubt, it is probable that the Courts would be influenced by the practice. [See *Essex* v. *Baugh*, 1 You. & C. C. C. 620.]

Practice of the registry-office in regard to the contents of the memorial.

MEMORIALS UNDER THE REGISTRY ACTS.

Middlesex.

—otherwise to be void against subsequent purchasers, &c.

and that every such deed or conveyance shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration (*c*), unless such memorial thereof be registered, as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim. And that every such devise by will shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered at such times and in such manner as is hereinafter directed."

. Sects. 2, 3, and 4, relate to the appointment and duties of the registrars. See 24 Geo. 2, c. 4.

Memorials how to be executed; —of deeds;

Sect. 5. " That all and every memorials so to be entered and registered, shall be put into writing in vellum or parchment, and brought to the said office of deeds; and, in case of *deeds* and *conveyances*, shall be *under the hand* (*d*) *and seal of some or one of the grantors, or some or one of the grantees, his or their heirs, executors or administrators, guardians, or trustees* (*e*), attested by *two witnesses, one whereof to be one of the witnesses to the execution*

Grantor and his assignees bound by unregistered deed.

(*c*) [Registry is of course not material to perfect a title as against the grantor himself, or his assignees in bankruptcy, though their appointment is duly registered. *Jones* v. *Gibbon*, 9 Ves. 407; *Ex p. Coles, re Rucker*, 1 Dea. & C. 100; 1 Mon. & A. 481; *Sumpter* v. *Cooper*, 2 B. & Ad. 223; *Hodson* v. *Sharpe*, 10 East, 352.]

Lease by corporation;— signature.

(*d*) [When the instrument is a lease by a corporation aggregate, it seems to be the practice to require the lessee to execute the lease, on the ground that the affixing of the corporate seal to the memorial would not satisfy the words " *hand and seal.*" (Rigge, 106). This is a mere crotchet. The word " hand" is incapable of any other than the metaphorical meaning of signature, and the seal of a corporation is its signature. *Doe* d. *Cutlers' Co.* v. *Hogg*, 1 N. R. 306.]

Whether the heir, &c., executing the memorial should also execute the deed.

(*e*) The act evidently only requires the heirs, executors, &c. of the party, to sign and seal the *memorial*; but Mr. Rigge (on Registry, p. 74) suggests that, from the indistinctness of the clause, the instrument to be registered should, notwithstanding it is already sufficiently executed for general legal purposes, be signed and sealed by the party requiring the registry, as if he were a party in his own right. The clause, however, seems to be sufficiently definite: it simply requires the memorial to be thus executed, and its execution to be proved by one of the witnesses to the deed, which requisition cannot be considered as implying that the deed and memorial shall be executed by the same parties. The practice, however, of making the heir, &c., execute the deed as well as the memorial, (which the editor understands is not invariably insisted on), can do no harm, provided the witness deposing to his execution of the deed and memorial is one of the attesting witnesses to the execution of the deed by one of the original parties; but this is material to be attended to, for, if the construction of the act contended for in the preceding observations be correct, it would not be sufficient that such witness had attested the execution by the heir, &c. requiring the memorial.

MEMORIALS UNDER THE REGISTRY ACTS.

of such deed or conveyance (*f*); which witness shall upon his oath, before one of the said registers or masters, or before a master in Chancery, ordinary or extraordinary, *prove the signing and sealing of such memorial, and the execution of the deed or conveyance mentioned in such memorial;* and in case of *wills*, the memorial shall be under the hand and seal of some or one of the devisees, his or their heirs, executors, or administrators, guardians, or trustees, attested by two witnesses, one whereof shall, upon his oath, before the said registers or masters, or before such master in Chancery as aforesaid, *prove the signing and sealing of such memorial*, (which respective oaths the said registers or masters, and masters in Chancery, are hereby empowered to administer), and shall indorse a certificate thereof on every such memorial, and sign the same."

Middlesex.

—of wills.

Sect. 6. "That every memorial of any deed, conveyance, or will, shall contain the *day of the month and the year* when such deed,

Contents of memorial.

(*f*) Sir E. B. Sugden thinks, (3 Vend. 351), that, though the memorial may be executed, either by the grantor or grantee, yet that the witness making the affidavit should be a witness to the execution by the party from whom the estate moves. The practice however is, to admit the witness who has attested the execution by *either* party; (see Rigge, p. 74): and this, it is probable, would be held to be sufficient, for it seems difficult to support Sir E. B. Sugden's hypothesis upon the terms of the act. The word "execution," it is conceived, must be taken to refer to an execution by either of the parties immediately before mentioned, and this construction seems to be somewhat aided by the subsequent clause in regard to wills, which requires the memorial to be executed by the devisee, thereby indicating that the Legislature had not exclusively in view the authentication of the execution of instruments by the person from whom the estate moved. It is better, however, to avoid the question, where practicable, by procuring the witness attesting the execution by the grantor, to make the deposition before the register. [The same difficulty occurs upon the Yorkshire acts. The provision in the act for the North Riding, that copies, registries of deeds inrolled at length, shall be good secondary evidence, expressly requires that, for the purpose of such inrolment at length, the execution by the *grantor* shall be proved; which was of course a necessary precaution. This seems strongly to confirm the opinion, that in other cases the Legislature intended to admit proof of execution by either party. A memorial of an assignment of a lease signed by the assignee is good secondary evidence of the assignment against those claiming under the assignee; *Wollaston* v. *Hakewell*, 3 Scott, N. R., 593; and an examined copy of the memorial is admissible for that purpose. *Molton* v. *Harris*, 2 Esp. 549; *Collins* v. *Maule*, 8 Car. & P. 502; *Doe* d. *Ubele* v. *Kilness*, 2 Id. 289.]

Whether proof of execution by *grantee* be sufficient.

[A suggestion by Mr. Rigge, (p. 77; and see 2 Cov. Pow. Mortg. 619), that "if a considerable time has elapsed from the date of a deed intended to be registered, and all the witnesses are dead, or the testimony of them not easily obtained, *the re-execution of such deed by any one of the parties in the presence of a new witness* will be sufficient to effectuate the registry," appears to have been sometimes acted upon. It is scarcely necessary to say that such a proceeding and registry would be a mere nullity. See *Essex* v. *Baugh*, 1 You. & Col. Ch. Cas. 620; 3 Sugden's Vendors, 351.]

As to re-execution for registry.

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conveyance, or will, bears date, and the *names and additions of all the parties* to such deed or conveyance, and of the *devisor* or testatrix of such will, and of *all the witnesses* to such deed, conveyance, or will, and the *places of their abode*, and shall express or mention the honors, manors, lands, tenements, and hereditaments, contained in such deed, conveyance, or will, and the names of all the parishes, townships, hamlets, precincts, or extra-parochial places within the said county, where any such honors, &c. are lying, that are given, granted, conveyed, devised, or any ways affected or charged by any such deed, conveyance, or will, *in such manner as the same are expressed or mentioned in such deed, conveyance, or will*, or to the same effect (*g*). And that every such deed, conveyance, and will, or probate of the same, of which such memorial is so to be registered as aforesaid, shall be produced to the said registers or masters at the time of entering such memorial, who shall indorse a certificate on every such deed, conveyance, and will, or probate thereof, and therein mention the certain day, hour, and time, on which such memorial is so entered or registered, expressing also in what book, page, and number, the same is entered; and that the said registers or masters shall sign the said certificate when so indorsed, which certificate shall be taken and allowed as evidence of such respective registries in all courts of record whatsoever.' (The clause then directs the manner of keeping the register).

Where there are more writings than one—description of parcels in one, sufficient.

Sect. 7. "That where there are more writings than one for making and perfecting any conveyance or security, which do name, mention, or any ways affect or concern the same honors, &c., it shall be a sufficient memorial and register thereof, if all the said honors, &c., and the parishes, townships, hamlets, or extra-parochial places wherein the same lie, be only once named or mentioned in the memorial or register of any one of the deeds or writings, made for the perfecting of such conveyance or security; and that the dates of

As to describing the parcels.

(*g*) [Sometimes the parcels are stated in the reciting part of the deed, in which case, of course, the description in the memorial must be taken from the recital; and generally, every material word of description applicable to the premises in respect of which the registry is made, in whatever part of the deed it may be found, should be transferred to the memorial, but not of course with repetition, or as to any general description which is included in one more particular. If the deed describes the parcels by reference to a description contained in another deed, it will be sufficient to state in the memorial the referential description contained in the deed which is to be registered, whether the other deed has been registered or not. This will satisfy both the words and the spirit of the act. If the former deed containing the description has not been registered, and the grantee under the new deed derives title through it, *that* defect may expose him to danger. See p. 685, n.]

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the rest of the said deeds or writings relating to the said conveyance or security, with the names and additions of the parties and witnesses, and the places of their abodes, be only set down in the memorials and registers of the same, with a reference to the deed or writing whereof the memorial is so registered, that contains or expresses the parcels mentioned in all the said deeds, and directions how to find the registering the same" (*h*).

Memorials of wills, when to be registered.

Sect. 8. "That all memorials of wills that shall be registered in manner as aforesaid, within the space of six months after the death of every respective devisor or testatrix, dying within the kingdom of Great Britain, or within the space of three years after the death of every respective devisor or testatrix, dying upon the sea or beyond the seas, shall be as valid against subsequent purchasers, as if the same had been registered immediately after the death of such respective devisor or testatrix."

In case of concealment or contesting of will.

Sect. 9. "That in case the devisee, or person or persons interested in the honors, &c. devised by any such will as aforesaid, by reason of the concealment or suppression, or contesting such will, or other inevitable difficulty, without his, her, or their wilful neglect and default, shall be disabled to exhibit a memorial for the registry thereof within the respective times hereinbefore limited, and that a memorial shall be entered in the said office of such contest or other impediment within the space of two years after the death of such devisor or testatrix, who shall die within the kingdom of Great Britain, or within the space of four years next after the decease of such person who shall die upon the sea or beyond the seas, then and in such case the registry of the memorial of such will within the space of six months next after his, her, or their attainment of such will, or a probate thereof, or removal of the impediment," shall be a sufficient registry (*i*).

(*h*) This clause only relates to cases where there are several instruments intended to operate as one conveyance, and, Sir E. B. Sugden suggests, cannot make it sufficient, in the registry of an assignment of a lease, (as is the practice), to refer to the parcels in the lease, provided it has been previously memorialised. Possibly, indeed, under the prior clause requiring the honors, &c. to be mentioned or expressed in the memorial, a reference to any part of the rolls, containing a description of the lands, would be held to be sufficient. The clause in question, however, making an exception in the case of several deeds operating as one conveyance, affords an argument against this construction, which, therefore, ought not to be relied on. It would be applicable of course as well to other instruments as assignments of leases. [Where the deed itself describes the parcels by reference only, a description by reference in the memorial is sufficient. Ante, p. 684, n.]

Whether sufficient to refer to former memorialised deed containing the description.

(*i*) Mr. Rigge suggests, (p. 84, n.), that wills and probates, and copies of wills which have not been registered

Time for registering wills.

MEMORIALS UNDER THE REGISTRY ACTS.

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Protection to purchasers against concealed will.

Sect. 10. "That, in case of any concealment or suppression of any will or devise, any purchaser or purchasers shall not be disturbed or defeated in his or their purchase, unless the will be actually registered within five years after the death of the devisor or testatrix" (*k*).

Certificate of the discharge of mortgages to be registered.

Sect. 16. "That in case of mortgages, whereof memorials shall be entered in the said register office pursuant to this act, if at any time afterwards a certificate shall be brought to the said registers or masters, signed by the mortgagee or mortgagees in such mortgage, his, her, or their executors, administrators, or assigns, and attested by two witnesses, whereby it shall appear that all monies due upon such mortgage have been paid or satisfied in discharge thereof, which witnesses shall upon their oaths before the said registers or masters, or before a master in Chancery, ordinary or extraordinary, (who are hereby respectively empowered to administer such oath), prove such monies to be satisfied or paid accordingly, and that they saw such certificate signed by the said mortgagee or mortgagees, his, her, or their executors, administrators, or assigns, that then and in every such case the said registers or masters shall make an entry in the margents of the said register books against the register of the memorial of such mortgage, that such mortgage was satisfied and discharged according to such certificate, to which the same entry

within the period directed by the statute, might, if subsequently registered, operate against subsequent purchasers, but there is certainly ground to contend that the clauses of the act requiring the registration within this period render it absolutely void against purchasers or mortgagees from the heir, if not done within the time specified. [This opinion has extensively prevailed; but so harsh a construction would scarcely be adopted, unless imperatively required by the words of the act. The intention is plainly to give to the will, if registered within six months, the same effect as against prior purchasers, which it would have had if registered immediately after the testator's death: in other words, to make purchases from an heir within six months from the testator's death unsafe. The words "subsequent purchasers" evidently mean purchasers subsequent to the taking effect of the will, i. e. the death of the testator, not the registration of the will. See 3 Sugd. Vend. 347; and see some judicious remarks in Mr. Wilson's useful Treatise on Registering Deeds, pp. 10—21.]

The act does not authorize the registration of copies of wills, though they are received in the office.

[Where leaseholds are bequeathed by will, and the executor gives his assent in writing, the legatee's title must be protected by registering the *assent* of the executor. Vide ante, Vol. 3, p. 5. If the assent is merely verbal, registry is, of course, out of the question, (see *Williams* v. *Sorrell*, 8 Jur. 389); but a legatee of leaseholds cannot be advised to rest satisfied without written evidence of assent. Registering the will, or, where there is no will, the letters of administration, is not necessary, for an obvious reason.]

(*k*) [A similar provision occurs in the act for the North-Riding; but the term is three years. The other acts have no such provision.]

shall refer, and shall after file such certificate, to remain upon record in the said register office" (*l*).

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Act not to extend to copyholds, &c.

Sect. 17. "That this act shall not extend to any copyhold estates (*m*), or to any leases at a rack-rent (*n*), or to any lease not exceeding one-and-twenty years, where the actual possession and occupation go either along with the lease (*o*), or to any of the chambers in Serjeant's Inn (*p*), the inns of Court, or inns of Chancery."

Judgments, statutes, and recognizances, (other than those of the crown), to be registered.

Sect. 18. "That no judgment (*q*), statute, or recognizance, (other than such as shall be entered in the name and upon the proper account of her Majesty, her heirs and successors), shall affect or bind any honors, &c. in Middlesex, but only from the time that a memorial of such judgment, &c. shall be entered at the said register office, expressing and containing, in case of such judgment, the names of the plaintiffs, and the names, additions, and places of abode (if any such be in such judgment) of the defendants, the sums thereby recovered, and the time of the signing thereof; and in case of statutes and recognizances expressing and containing the date of such statute or recognizance, the names, additions, and places of abode of the cognizors and cognizees therein, and for what sums,

(*l*) Certificates of the discharge of judgments, rules of courts of law, decrees or orders of courts of equity, and writs of execution, are frequently registered; (see Rigge, 83, 149; Watson, 24); and there is a convenience in the practice, as to judgments, inasmuch as they appear as incumbrances on the rolls; but, as the registration is not directed by the act, it is wholly inoperative.

(*m*) It is usual, however, and seems to be a prudent precaution, to register leases of copyholds, granted by license or custom for more than twenty-one years.

(*n*) [Mr. Rigge suggests, (p. 88, n.), that a lease originally at rent-rack ceasing to be so by improvements or rise in value from any cause, may be held to cease to be within the exception. But this would be a very inconvenient construction.]

(*o*) Where the assignment is by way of mortgage, in which case the "possession and occupation" generally do not "go along with the lease," the lease and assignment, though the lease does not exceed twenty-one years, should be registered. In other cases, i. e. where the possession and occupation do accompany the lease, there seems to be no pretence for requiring the registry, although the lease be assigned for a valuable consideration. [See *Bailey* v. *Fermor*, 9 Price, 268.]

As to the registration of assignments of leases.

(*p*) [It has been suggested that this exception of a place within the city of London shews an intention to include the city within the operation of the act. Rigge, 88, n. As the act only mentions the county of Middlesex, it is clear that no such implication can be made from a mere saving.]

London not within the act.

(*q*) [Judgments must still be registered under the registry acts, in order to bind lands within their respective districts, notwithstanding the stat. 1 & 2 Vict. c. 110, establishing a registry in the C. P. But decrees and orders of courts of equity, and rules of court deriving effect from the stat. 1 & 2 Vict. c. 110, are not within the registry acts. As to the searches proper to be made for judgments, vide ante, Vol. 1, p. 111].

Judgments, decrees, &c.

[Glebe lands are not bound by the judgment, but by the delivery of the writ, and therefore registry of the judgment is not necessary in respect of such lands. *Cottle* v. *Warrington*, 2 Nev. & M. 227.]

Glebe lands.

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and before whom, the same were acknowledged; and that, in order to the making an entry of such memorials of judgments, statutes, and recognizances, as aforesaid, the party and parties desiring the same shall produce to and leave with the said registers or masters, to be filed in the said public or register office, a memorial of such judgment, statute, or recognizance, signed by the proper officer, or his deputy, who shall sign such judgment in the same office, or by the proper officer in whose office such statute or recognizance shall be inrolled, together with an affidavit, sworn before one of the judges at Westminster, or a master in Chancery, that such memorial was duly signed by the officer whose name shall appear to be thereunto set; which memorial such respective officer is hereby required to give such plaintiff or plaintiffs, cognizee or cognizees, or his, her, or their executors, or administrators, or attornies, or any of them, he, she, or they, paying for the same the sum of one shilling."

Registrar to give certificate.

Sect. 19. "That the said register or master shall make an entry, and likewise, if required, give a certificate in writing under his hand, testified by two credible witnesses, of every such memorial of any judgment, statute, or recognizance, brought to him to be so registered as aforesaid, and therein mention the certain day on which such memorial is so registered or entered, expressing also in what book, page, and number, the same is entered."

Stat. 2 & 3 Ann. c. 4. *West-Riding.*

By stat. 2 & 3 Ann. c. 4, all deeds and wills affecting lands in the West-Riding of Yorkshire, are to be registered at the office at Wakefield; and the memorial must be under the hand and seal of some or one of the grantors or grantees, or devisees, or his or their *guardians or trustees.* Where the deeds are executed within forty miles of the West-Riding, the witness must attend at the office; but in other cases the affidavit may be sworn before one of the judges at Westminster or a master in Chancery.

Wills of persons dying within the kingdom of England, or the dominion of Wales, or Berwick, must be registered in six months, and of persons dying beyond the seas within *three years,* or in case of impediment within *six months* after its removal.

6 Ann. c. 35; *East-Riding* and *Kingston-upon-Hull.*

Stat. 6 Ann. c. 35, established an office at Beverley for the registry of deeds relating to the East-Riding of York and Kingston-upon-Hull, and contains the same provisions as are in the Middlesex Act in regard to the execution of the memorial by *heirs, executors, administrators, guardians or trustees, the registration of judgments, statutes, and recognizances,* and certificates of mortgages being discharged, (but which are to be signed by both *mortgagor* and mortgagee, in the presence of the register or his deputy), and applies

these provisions to all lands in the *West-Riding*, the mortgage or purchase whereof shall exceed 50*l*. By this act judgments, statutes, and recognizances must be registered within *thirty days* after the signing or acknowledgment thereof. And certificates of their discharge are authorized to be registered in the same manner as in the case of mortgages.

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Judgments.

The stat. 8 Geo. 2, c. 6, relates to the North-Riding, the register-office of which is at Northallerton. Here both the witnesses to the memorial (evidently from the inadvertent omission of a few words in the act) are required to prove its execution; or the party executing the memorial may acknowledge his execution thereof, and of the deed, before the register or his deputy, which is a regulation peculiar to this act. Judgments, &c. must be registered within *twenty days*. The provision as to wills is the same as in the other Yorkshire acts, with the addition that purchasers are not to be affected by any will not registered within *three years*. By this act also, deeds and wills may be registered at length, and copies are evidence in case of their destruction by fire or other accident: the execution by the grantor or testator must be proved by one of the witnesses. Copies so registered have the same effect as a memorial.

Stat. 8 Geo. 2, c. 6, *North-Riding*.

Judgments.

Wills.

Registry at length, copies, evidence.

The Yorkshire acts authorise the inrolment of bargains and sales, on an acknowledgment by the bargainor, or one of the bargainors, taken before a justice of the peace of the Riding in which the inrolment is made; such inrolment to be of the same effect as if made in any of the Courts at Westminster; and the words *grant*, *bargain*, and *sell*, in the deeds, if not restrained by express words, are to operate as covenants for title, quiet enjoyment, and further assurance by the bargainor in respect of the acts of himself and those claiming under him. Such inrolments to have the same force as memorials.

Inrolment of bargains and sales in *Yorkshire*.

Implied covenants.

In the Ridings of Yorkshire and Kingston-upon-Hull, it is not usual to insert so much of the deeds as in Middlesex. The office at Beverley (and it is probable that the same rule extends to the offices for the other Ridings) requires a local description, and will not register deeds containing general indefinite descriptions, as of all the property of which a certain person died seised, &c.

Contents of memorial.

[To these enactments must be added that of 1 & 2 Will. 4, c. 56, s. 27, "That where, according to any laws now in force, any conveyance or assignment of any real or personal property of a bankrupt would require to be registered, inrolled, or recorded in any re-

Stat. 1 & 2 Will. 4, c. 56, s. 27. Certificate of appointment of bankrupt's assignees to be registered.

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gistry office in England, Wales, or Ireland, or in any registry office, court, or other place in Scotland, or any of the dominions, plantations, or colonies belonging to his Majesty, then in every such case such certificate as is hereinafter described of the appointment of an assignee or assignees shall be registered in the registry office, court, or other place wherein such conveyance or appointment as last aforesaid would require to be registered, inrolled, or recorded; and the registry hereby directed shall have the like effect to all intents and purposes as the registry, inrolling, or recording of such conveyance as last aforesaid would have had; and the title of any purchaser of any such property as last aforesaid for valuable consideration who shall have duly registered, inrolled, or recorded his purchase-deed previous to the registry hereby directed, shall not be invalidated by reason of such appointment of an assignee or assignees as aforesaid, or the vesting of such property in him or them consequent thereupon, unless the certificate of such appointment shall be registered within the times following; (that is to say), as regards the United Kingdom of Great Britain and Ireland, within two months from the date of such appointment, and as regards all other places, within twelve months from the date thereof." This provision is extended, by 5 & 6 Vict. c. 116, s. 8, to the certificates of appointments of assignees of insolvents appointed under the jurisdiction given by that act to commissioners in bankruptcy. And by stat. 1 & 2 Vict. c. 110, s. 46, stated ante, Vol. 1, p. 175, a similar provision is made for the registry of the title of assignees in insolvency. Vide ante, p. 682, n.]

5 & 6 Vict. c. 116, s. 8.

1 & 2 Vict. c. 110, s. 46.

Points decided upon the registry acts.

Appointment.

On the preceding statutes the following points have been decided:—That the registration of a deed creating a power does not dispense with the necessity of registering the appointment in exercise of the power; *Scrafton* v. *Quincey*, 2 Ves. sen. 413 (*r*); nor is the registration of an assignment of a lease a sufficient registration of the lease itself; for the act requires the deed under which the party claims, with the witnesses' names, to be registered. *Honeycomb* d. *Halpen* v. *Waldron*, 2 Stra. 1064.

Assignment of lease.

Legacy charged on land.

[The assignment of a legacy charged on real estate is not within the registry acts, and therefore, where a testator charged his lands in Yorkshire and elsewhere with the sum of 12,000*l.*, payable to A. and B., it was held that a mortgagee of one of such legacies who registered his deed acquired no priority in respect of such

(*r*) [See *Att.-Gen.* v. *Pickard*, 3 Mee. & W. 571. In *Scrafton* v. *Quincey*, the mesne incumbrancer took under the deed containing the power, and therefore, though it was not registered, that omission was not material.]

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charge over a prior unregistered incumbrancer. *Malcolm* v. *Charlesworth*, 1 Keen, 63.]

Clerical error.

A clerical inaccuracy does not vitiate the memorial; and therefore, where, in the memorial of an assignment in trust for sale, the name of the trustee was written "Seden" instead of "Soden," and the habendum was stated to be to "Cowie," (who was the grantee), instead of "Soden," Sir W. Grant, M. R., held, that the variance did not affect the validity of the registry. *Wyatt* v. *Barwell*, 19 Ves. 435. It will be observed that the inaccuracy in this case was palpable upon the face of the memorial, and could not mislead.

Actual notice of unregistered deed, &c. binds in equity.

In regard to the *effect* of registry: in *equity*, a purchaser or mortgagee derives no advantage by the registration of his deed against a prior unregistered instrument, *of which he has notice*. *Cheval* v. *Nichols*, Str. 664; 2 Eq. Ab. 63; *Blades* v. *Blades*, 1 Eq. Ab. 358; *Hine* v. *Dodd*, 2 Atk. 275; *Le Neve* v. *Le Neve*, 3 Atk. 646; 1 Ves. sen. 64: *Sheldon* v. *Cox*, 2 Eden, 224; *Bushell* v. *Bushell*, 1 Sch. & Lef. 102; 2 Sch. & Lef. 532: *Forbes* v. *Deniston*, 4 Br. P. C. 189; *Beatniff* v. *Smith*, 1 Eq. Ab. 357; per Lord Mansfield, 1 Burr. 474; Cowp. 712: *Davis* v. *Earl of Strathmore*, 16 Ves. 419. But constructive notice is not sufficient; there must be actual notice clearly proved. [Lis pendens is not such notice; nor will suspicion of notice justify the court in breaking in upon an act of Parliament. "It must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situation of the persons having the prior deed, and, knowing that, registered in order to defraud them of that title he knew at the time was in them. *Jolland* v. *Stainbridge*, 3 Ves. 478; *Irons* v. *Kidwell*, cit. 1 Ves. sen. 69; *Hine* v. *Dodd*, 2 Atk. 275; *Wyatt* v. *Barwell*, 19 Ves. 435. But distinct notice to an agent or trustee is actual notice to the principal, and has been held sufficient. *Le Neve* v. *Le Neve*, 1 Ves. sen. 68; *Sheldon* v. *Cox*, 2 Eden, 228; *Tunstall* v. *Trappes*, 3 Sim. 301. The entire equitable doctrine of notice is founded on the imputation of fraud; and, after the courts have once admitted the notion of "constructive fraud" for the purpose of defeating a title, to attempt a distinction in the particular case of the registry acts seems not only absurd but impracticable. It is settled that notice through an agent is sufficient; and it seems to be impossible to draw the line. See 2nd Real Prop. Rep. 38. Of course, if the purchaser or incumbrancer had no notice of a prior unregistered title when he took his conveyance or security, he may, after notice, protect himself. See *Essex* v. *Baugh*, 1 You. & C. C. C. 120.]

What is actual notice for the purpose.

MEMORIALS UNDER THE REGISTRY ACTS.

Though notice is in equity equivalent to registry, the deed first registered must prevail *at law* (*s*). *Doe* d. *Robinson* v. *Allsop*, 5 B. & Al. 142.

Registry not notice.

Registration is not itself notice; and therefore a purchaser or mortgagee who obtains the legal estate is not affected by a prior equitable registered incumbrance of which he had no notice aliunde. *Morecock* v. *Dickins*, Amb. 678; *Cator* v. *Cooley*, 1 Cox, 182; *Underwood* v. *Courtown*, 2 Sch. & Lef. 64; *Pentland* v. *Stokes*, 2 Ball & B. 75, 300, 521. Sir E. B. Sugden strongly contends against this doctrine, (Sugd. Vend., 5th ed., 608 (*t*)), but the courts seem disposed to adhere to it. *Wiseman* v. *Westland*, 1 You. & J. 117. [And a purchaser who has made a partial search will not be presumed to have notice of deeds recorded in a part of the register to which his search has not extended. *Hodgson* v. *Dean*, 2 Sim. & St. 221.]

Partial search.

Equitable charges.

[As to the necessity of registering equitable charges, see *Hennand* v. *Moore*, 1 Eden, 327, where it was held, that a lien upon land was not, by a sale of the land under a decree, transferred to the purchase-money in such a manner as to be out of the registry act as against incumbrancers whose title commenced after the conversion.]

Further charge without notice of registered puisne mortgage.

A first mortgagee advancing more money on the security, after a second mortgage, which has been registered, *but of which he had no notice*, shall have priority over such second mortgagee in respect of the advances so made. *Bedford* v. *Backhouse* or *Bacchus*, 2 Eq. Ca. Ab. 615, pl. 12; *Wrightson* v. *Hudson*, Id. 609, pl. 7. [The registry acts do not affect any of the equities incident to legal titles duly registered, or of which there is notice. 3 Atk. 651. So, if a mortgagor, without notice of a registered transfer of the mortgage, pays the mortgage-money to the mortgagee, he is entitled to call for a conveyance of the legal estate. *Williams* v. *Sorrell*, 4 Ves. 389. Ante, Vol. 5, pp. 295, 496. See *Cator* v. *Cooley*, 1 Cox, 182; *Chandos* v. *Brownlow*, 2 Ridg. P. C. 428.]

Non-registry of conveyance excluding a title by act of law.

[Purchasers from a party apparently entitled by devolution or act of law will not be defeated by a prior unregistered conveyance defeating that title. Thus a purchaser from an heir will not be defeated by an unregistered conveyance or will of the ancestor. See

(*s*) [Consequently, if a conveyance of the legal estate has not been registered, and the purchaser has a good equitable title, he may by registering his own equitable conveyance defeat the unregistered conveyance at law, and save the expense of getting in the legal estate.]

(*t*) The remarks, however, upon this point have been omitted in the later editions of Sir E. B. Sugden's valuable work.

MEMORIALS UNDER THE REGISTRY ACTS.

Blades v. *Blades*, 1 Eq. Ab. 358. So it has been held, on the Irish Registry Act, (6 Anne, c. 2, I.), that an unregistered marriage settlement of leaseholds belonging to the wife could not be set up against a registered lease by the husband under his supposed marital title. *Warburton* v. *Loveland* d. *Ivie*, 2 Dow. & Cl. 480; 6 Bligh, 1. In that case it was also held, that the title of the husband's lessee being good, an assignee of such lease was entitled, although his assignment was not registered. There was no conflict of title between parties claiming under a registered title.]

Deposit security.

[In *Sumpter* v. *Cooper*, 2 B. & Ad. 223, an equitable mortgagee by deposit was held entitled to hold against the assignees in bankruptcy of the depositor, whose assignment had been duly registered. Lord Tenterden, C. J., said—"We think the statute cannot be held to apply to the case of an equitable mortgage. It refers only to the registration of deeds. And where there is merely a lien or equitable mortgage created by the deposit of deeds, there is no instrument to be registered." This reasoning seems to be unanswerable, but it was not necessary to the decision in the case. Ante, p. 682, n. (*c*)]

REGISTRY.

PRECEDENTS.

1. GENERAL FORM.

1. [GENERAL FORM *of a* MEMORIAL *of a* DEED (*a*).

A MEMORIAL to be registered of an indenture, bearing date the —— day of ——, and made between [A. B.],

Stamps on memorials.

(*a*) By the Stamp Act, 55 Geo. 3, c. 184, a stamp of 10*s.* is imposed on every "memorial to be registered pursuant to any act of Parliament, made or to be made for the public registering of deeds and conveyances in England;" and for every piece of parchment after the first, a progressive duty of 10*s.*

As to the contents of the memorial.

[This form contains all that is required by any of the registry acts, and is commonly used in Yorkshire. In Middlesex, the practice of the office has been to encourage the insertion of much superfluous matter, which can scarcely ever be useful and may be detrimental to the interests of the grantee, who is always the registering party, and whose sole interest and safety the solicitor should remember it is his first duty to consider. In a case within the editor's knowledge, a lessor, by searching the registry, discovered to whom the lease had been assigned, and used the memorial as evidence against the assignee, which he could not have done if the effect of the deed had not been stated. See *Wollaston* v. *Hakewill*, 3 Scott, N. R. 593, ante, p. 683, n. In many cases (as in that of a mortgage) the assignee would be morally justified in concealing the fact of the assignment from the lessor; and whatever his moral rights may be, it is the duty of his solicitor to deprive him of none of his legal advantages.]

[The above form will apply, when, for any reason, a lease for a year is executed, either without any alteration, or with a reference to the lease for a year, by describing the release as "an indenture of release, founded on a lease for a year, and made" &c. The registry acts never required the lease for a year to be noticed in the memorial. Had it been necessary to register the lease for a year, the statute for dispensing with the execution of that instrument, as it does not supply the registry of it, would have been inoperative in respect of lands in the register counties. Vide ante, p. 290.]

1. GENERAL FORM.

of &c., of the first part; [C. D.], of &c., of the second part; and [E.F.], of &c., of the third part; of and concerning ALL THAT (*parcels, as in the deed, omitting the general words* (*b*)), with their appurtenances. WHICH indenture, as to the execution thereof by the said [A. B.], is witnessed by [A. Z.], of &c., and [B. Y.], of &c. (*c*), his clerk; and, as to the execution thereof by the said [C. D.] and [E. F.], is witnessed by [R. T.], of ——, in the county of ——, gent. [And the same indenture is hereby required to be registered (*d*) by the said [C. D.].] As WITNESS [his hand and seal] the hand and seal of the said [C. D.]

Signed and sealed in the presence of } (L. S.) [C. D.]

[*Two witnesses* (*e*).]

(*b*) [Vide ante, p. 684. If the premises are described by reference to a plan, (a copy of which should be made on the memorial, and another on paper, to be entered in the registrar's book), add— Description of parcels—plan.

"a map or plan whereof is drawn in the margin of the said indenture, and of this memorial."

(*c*) [The addition and place of abode of every witness must be stated in the memorial, whether stated in the attestation to the deed or not, ante, p. 684.] Witnesses.

(*d*) [This statement is unnecessary. If the deed is required to be registered by the heir or devisee of the grantee, however, it is proper to insert it, describing the heir or devisee thus:—

"by M. D., heir-at-law of the said [C. D.]," (*or as the case may be*), "by M. N., devisee named in the last will and testament of the said [C. D.]" Registry by heir or devisee of purchaser.

(*e*) If the attesting witness is in town, he should attend at the office with the memorial, where the following oath is administered to him:— "You swear that you saw this memorial signed and sealed, and the deed to which it refers duly executed, by the parties thereto, whose execution you have attested." If the witness cannot personally attend at the office, he should make an affidavit (on parchment) to the following effect:— Affidavit to be made by the attesting witness.

"[A. B.], of the city of Norwich, attorney-at-law, maketh oath and saith, that he, this deponent, was present, and did see [Y. Z.], of the same city, esquire, sign and seal the memorial above written: (*or, if the memorial be not on the same piece of parchment,* 'the memorial hereunto annexed'): and this deponent further saith, that he was present, and did see

1. GENERAL FORM.

the deed referred to in such memorial duly signed, sealed, and delivered by the said [Y. Z.], (*or any other party, as the case may be*).

Sworn at the city of Norwich, aforesaid, this —— day of ——, before me,

[M. M.]
A Master Extraordinary in Chancery.

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2. MORTGAGE BY WAY OF UNDER-LEASE.

2. MEMORIAL *of* MORTGAGE *by way of* UNDER-LEASE, *registered at the same Time as the Lease, and written under the Memorial thereof.*

A MEMORIAL to be registered of an indenture, bearing date the —— day of ——, made between the above-named [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part; of and concerning all and singular the hereditaments and premises mentioned and described in the above memorial. WHICH indenture, as to the execution by the said [*mortgagor*], is witnessed by [*witness*], of &c.; and, as to the execution by [*mortgagee*], is witnessed by [*witnesses*], of &c. As WITNESS the hand and seal of the said [*mortgagee*].

[*Two witnesses.*]

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3. CERTIFICATE OF SATISFACTION OF MORTGAGE.

3. CERTIFICATE *of* SATISFACTION *of* MORTGAGE.

TO the Registrars for the County of Middlesex: I, [*mortgagee*], (*or the executor or administrator of the mortgagee, as the case may be* (*a*)), of &c., do hereby certify, that [*mortgagor*], of &c., hath paid and satisfied all monies due and owing upon an indenture of mortgage bearing date the —— day of ——, made between the said [*mortgagor*] and [*wife*],

(*a*) If the memorial be of lands in the East or West-Ridings of Yorkshire, or in Kingston-upon-Hull, the mortgagor, or his executor or administrator, must concur in this certificate.

his wife, of the first part; [*trustee*], of &c., of the second part; and me, the said [*mortgagee*], (*or, if by an executor or administrator,* "and the said [*mortgagee*], deceased"), of the third part; a memorial whereof was registered on the —— day of the same month of ——, B. ——, No. ——. And I do hereby require an entry of such payment and satisfaction to be made in the Registrar's Book wherein the same is registered, pursuant to the act of Parliament in that case made and provided. As witness my hand this —— day of ——, 18—.

3. CERTIFICATE OF SATISFACTION OF MORTGAGE.

Signed, and satisfaction acknowledged, in the presence of }

[*Two witnesses.*]

4. MEMORIAL *of a* JUDGMENT.

4. JUDGMENT.

A MEMORIAL to be registered of a judgment in her Majesty's Court of Queen's Bench, (*or otherwise as the case may be*), of Trinity Term in the —— year of the reign of Queen Victoria, Roll No. ——, between [A. B.], plaintiff, and [C. D.], defendant; in a plea of debt for 100*l.* and costs 63*s.*; which judgment was signed in the above cause on the —— day of —— last. Dated the —— day of ——, 18—.

[A. B.], Secondary.

(*Then follows this Affidavit*).

[A. B.], clerk to ——, of Lincoln's Inn, in the county of Middlesex, gent., maketh oath, That he was present, and did see [*secondary*], Secondary of the Court of Queen's Bench, sign the above certificate.

[*Deponent*].

Sworn at the public office, in Southampton Buildings, Chancery-lane, this —— day of ——, 18—, before me, }

[*Master.*]

5. OF A WILL.

5. MEMORIAL *of a* WILL (*a*).

A MEMORIAL to be registered of the last will and testament (*or the probate of the last will and testament, as the case may be*) of [*testator*], late of —— street, in the parish of ——, in the county of ——, deceased, bearing date the —— day of ——. BY WHICH will the said testator did give and devise all his real and personal estate and effects whatsoever and wheresoever unto [*devisees*], their heirs, executors, and administrators, upon and for certain trusts and purposes. WHICH will was executed by the said testator in the presence of [*witnesses*], of &c. And the same is hereby required to be registered by [*devisee*], one of the devisees therein named. AS WITNESS &c. (*ut ante*).

As to registering of wills.

(*a*) Much inconvenience arises in practice from the frequency of the neglect to register wills within the period required by the statute. Where the devisee is not the heir, it should never be omitted.

[It is often impracticable to state the limitations in the will in a short compass, and never necessary to mention them at all. It is sufficient in every case, if, after stating the date of the will, the memorial proceed thus:—

"and devising or affecting all (*here transcribe all descriptive words in the will which include the lands in respect of which the registry is made*). WHICH will was executed" &c.]

RELEASES

AND

COMPOSITION DEEDS.

PRELIMINARY REMARKS.

I. POWERS, DUTIES, AND RESPONSIBILITIES OF EXECUTORS AND TRUSTEES.

II. RELEASES.

I. AS TO THE POWERS, DUTIES, AND RESPONSIBILITIES OF EXECUTORS AND TRUSTEES (*a*).

POWERS AND DUTIES OF TRUSTEES.

1. *In regard to Investments, the Deficiency of Securities, and Failure of Bankers and other Agents*, p. 699.
2. *How far responsible for the Acts of each other; and as to Acquiescence by the Cestuis que Trust*, p. 718.
3. *Allowance for Trouble and Expenditure*, p. 730.
4. *Retention and Payment of Legacy Duty*, p. 737.

As to investments by trustees.

1. *In regard to Investments, the Deficiency of Securities, and Failure of Bankers and other Agents.*]—Persons lending or investing trust monies should see, 1st, That the proposed security is of a nature which the trust authorizes; 2ndly, If the security is a mortgage, or any other private security, that it is sufficient in point of value; 3rdly, That all pre-requisites of consent, &c. required by the trust have been obtained.

(*a*) It has been deemed that an inquiry into the powers, duties, and responsibilities of trustees would be not unaptly associated with the title "Releases." The present article embraces many points incidentally connected with, though not directly included in, its several sections. It is not offered as a complete dissertation on the subject, but merely as selecting some useful topics for discussion on points respecting which there is a dearth of information in the books. [But see now Mr. Lewin's very able and useful treatise.]

POWERS AND DUTIES OF TRUSTEES.

What investments may be made.

1st. As to the nature of the security. This question of course can only arise where the instrument creating the trust fails to express and define the nature of the security; for if it does so, there can be no doubt as to its warranting an investment upon any security of the specified nature, and as to its not warranting an investment on any other, according to the rule, expressio unius est exclusio alterius. Where the trust to invest is wholly indefinite as to the nature of the investment, the most prudent course is to invest in 3*l.* per Cent. Annuities, which is the fund in which the Court of Chancery lays out the monies of suitors, on account of its being a permanent or irredeemable stock, or at least redeemable only at par, which hitherto has exceeded the highest market price of the stock. Adhering to this rule, the trustee, whatever happens, would be protected; and in no other course, under such circumstances, is complete safety to be found. *Ex p. Champion*, 3 B. C. C. 434; *Howe* v. *E. of Dartmouth*, 7 Ves. 150; *Holland* v. *Hughes*, 16 Ves. 114. [See *Cooper* v. *Douglas*, 2 B. C. C. 232. But they are not bound to select the actual fund (3*l.* per Cent. Consols) which the Court habitually resorts to; 3 You. & C. 316; and where particular days of payment are named by the testator, the Court will select that kind of stock which will suit such days. *Caldecott* v. *Caldecott*, 4 Madd. 189.]

As to mortgage investments.

A mortgage is only a proper investment when the trust is to lay out on mortgage, or, which is equivalent, on real security. *Brown* v. *Litton*, 1 P. W. 141. And though Lord Keeper Harcourt laid it down, that an executor putting out money on real security was not liable to answer for any loss, (and see *Knight* v. *E. of Plymouth*, Dick. 126; *Pocock* v. *Reddington*, 5 Ves. 800), it must be remembered, that, at this early period, the public funds were comparatively inconsiderable, and did not afford the same facilities for investment as at present. In *Widdowson* v. *Duck*, 2 Mer. 494, it was contended that a trust to place out money at interest "upon some good and sufficient security" did not authorize an investment on mortgage; but the case did not raise the general question, as a suit had been instituted, under which a decree had been made, establishing the trusts of the will, and directing the usual accounts; and Lord Eldon ruled, that a trustee or executor *after* a decree was not authorized to lay out money on mortgage without a previous application to the Court. He was therefore ordered to pay into Court the money so laid out. [The rule of the Court is settled, not to make any investment except on Government securities. *Ex p. Calthorpe*, 1 Cox, 182; *Ex p. Ellice*, Jac. 234; *Norbury* v. *Norbury*,

4 Madd. 191. Where a testator bequeathed a sum of Consols and the residue of his personal estate, with a direction to invest the residue in Consols, and from time to time to invest the accumulations in Consols, an investment on mortgage was held to be a clear breach of trust, so as to make the trustee answerable for the amount of stock and the profits which the accumulations would have produced. *Pride* v. *Fooks*, 2 Beav. 430. As to loans on mortgage of lands in Ireland, see stat. 4 & 5 Will. 4, c. 29, ante, Vol. 5, p. 327. *Stuart* v. *Stuart*, 3 Beav. 430. But where the Court finds a trust fund invested on mortgage, it will not change the investment without reason, 7 Ves. 150.]

POWERS AND DUTIES OF TRUSTEES.

Trust for accumulation.

Mortgage of lands in Ireland.

[Where trustees had an option to invest either in the funds or on real security, it was held, that, on a loss by improper investment on personal security, the trustees were liable only to replace the principal, and not the amount of stock which might have been purchased; for, if real security had been taken, the principal only would have been forthcoming, and the want of real security was all that was imputable to the trustees. *Marsh* v. *Hunter*, 6 Madd. 395. But this case has not been followed. *Hockley* v. *Bantock*, 1 Russ, 141: *Dimes* v. *Scott*, 4 Russ. 195. See *Brown* v. *Sansome*, M'Clel. & Y. 427. Thus, on a recent case, where a marriage settlement of freeholds contained a power for the trustees, with the consent of the husband and wife, to sell, and purchase other lands; with a direction that the proceeds should, with all convenient speed, and, with the like consent, be invested in the purchase of other lands, to be settled to the same uses; and that until a convenient purchase could be found, it should be lawful for the trustees, with the like consent, to invest the monies either in the public stocks or funds, or upon Government or good real security, at interest. In 1810 and 1811, the trustees, with the consent of the husband and wife, sold all the settled estates, but did not make any investment of the proceeds. In 1816, upon the request in writing of the husband and wife, they lent the whole of the money in their hands to the husband on bond. That security having failed, Lord Langdale, M. R., held, that as the trustees had not invested the purchase-monies, they were answerable, at the option of the cestuis que trust, either to purchase such a sum of Consols as might have been purchased in 1816, on the day when the breach of trust was committed by the loan to the husband, or to account for the amount of the purchase-monies. There was not sufficient in the bill to charge them in respect of the non-investment before the loan. *Watts* v. *Girdlestone*, 7 Jur. 501. It turned out, however, that the

Rule where trustees have an option.

Trustees who have made an improper investment answerable, at the option of the cestuis que trust, in stock or money, notwithstanding a power to invest on real security.

Watts v. *Girdlestone.*

POWERS AND DUTIES OF TRUSTEES.

defendants by this decision became liable for a arger amount of stock than they would have had to replace, if the non-investment had been treated as the breach of trust. So, in *Kellaway* v. *Johnson*, 5 Beav. 319, a sum of 3000*l.* Consols was settled to the separate use of a married woman for her life, with a power of appointment by will, and a power for the trustees, with the consent in writing of the husband and wife to vary the securities for other Government or real securities. The trustees, without the wife's consent, in 1799, sold out the stock for 2040*l.*, and purchased 102*l.* Long Annuities. In 1801 the Long Annuities were sold for 1760*l.* 15*s.*, which was lent on bond. The bond-debt was paid to the husband, who purchased with it a leasehold estate, and he and his wife executed a deed, declaring the trusts of the leaseholds, and reciting the previous dealings with the trust-property as having been made with the consent of the husband and wife. Lord Langdale, M. R., held, that the wife was not liable in consequence of having executed that deed, and that the husband and the trustees were bound to replace the 3000*l.* Consols. In consequence of the 32nd Order of August, 1841, all the trustees were not before the Court, and the relative liabilities of the husband and the trustees among themselves were not determined. See *Perry* v. *Knott*, 5 Beav. 293.]

Bank Stock.

Bank Stock cannot be purchased under a trust to invest in Government security. *Howe* v. *Earl of Dartmouth*, 7 Ves. 152. In *Trafford* v. *Boehm*, 3 Atk. 440, Lord Hardwicke held, that an investment in South Sea Stock or Bank Stock was not authorized by a trust to invest in Government funds, *or other good securities*. [See *Adye* v. *Feuilleteau*, 2 Dick. 499, n.; 1 Cox, 24. In *Mills* v. *Mills*, 7 Sim. 501, the Court, having decided that the residuary bequest under consideration was not intended to be specific, directed Bank Stock, which formed part of the residue, to be sold; "not because it is not a permanent fund, but because it depends on the will of the directors of the Bank, whether the annual profits (which are fully as valuable as the ordinary profits) shall go to tenants for life, or shall form part of the capital of the stock; and this Court will not allow the interests of tenants for life and remaindermen to depend on the directions the Bank may think proper to give respecting bonuses."

Exchequer bills.

Exchequer bills are not within a power to invest on "Government securities," in the stat. 1 & 2 Vict. c. 117; *Ex p. Chaplin*, 3 You. & C. 397; although, on account of their ready convertibility, they are proper interim investments of money to be laid out on real estate. *Matthew* v. *Brise*, 12 Law J., N. S., Ch., 263; as to investments of trust property left in India on Indian securities,

see *Holland* v. *Hughes*, 3 Meriv. 685; 16 Ves. 111.] It is clear, that an executor or trustee is not justified in laying out money on a *personal* security; *Terry* v. *Terry*, Pre. Ch. 273; *Ryder* v. *Bickerton*, 2 Eden, 149, n.; 3 Swanst. 80, n.: *Vigrass* v. *Binfield*, 3 Madd. 62; *Walker* v. *Symonds*, 3 Swanst. 62; a rule which, Lord Kenyon has observed, should be rung in the ears of every person who acts in the character of a trustee; see *Holmes* v. *Dring*, 2 Cox, 2. And nothing less than an express and unequivocal authority will exempt him from responsibility in doing so; for it has been held, that a general direction to invest in the funds, "or such other good security as the trustees can procure, and shall think safe," does not confer a power to lend on personal security. *Wilkes* v. *Steward*, G. Cooper, 6. [See *Forbes* v. *Ross*, 2 Cox, 113; *Ex p. Hakewill*, 2 Mon. D. & De G. As to the effect of a direction to lend a fund to A., "on condition that he should, to the satisfaction of the trustees, give them the best and most sufficient security in their power," see *Mills* v. *Osborne*, 7 Sim. 30. Even an express authority to invest on an improper security might not be available by an executor against the claims of creditors, who are not bound by the will. *Doyle* v. *Blake*, 2 Sch. & Lef. 239. If the power is to lend to a particular person, and he takes the benefit of an Insolvent Debtors' Act, a subsequent loan to him is not within the power. *Ross* v. *Godsall*, 1 You. & C. C. C. 617.] And even an express trust to lend upon personal security has been decided not to justify a loan to a *trader* on his bond by way of accommodation. *Langston* v. *Ollivant*, G. Coop. 33; [1 Myl. & Cr. 15; or a loan to one of the trustees, it being the duty of each of them to exercise an impartial judgment as to the solvency of the borrower; —— v. *Walker*, 5 Russ. 7; *Gleadon* v. *Atkin*, 2 Cr. & J. 548.] As to actions by an executor to recover money lent by him, see *Webster* v. *Spencer*, 3 B. & Al. 360; *Gallant* v. *Bouteflower*, 3 Doug. 34; *Edwards* v. *Grace*, 2 Mee. & W. 190.

Personal security.

Lending to co-trustees.

A trustee lending money to his co-trustee on his promissory note, (*Keeble* v. *Thompson*, 3 B. C. C. 112), or to a mercantile firm in which his co-trustee is partner, (*French* v. *Hobson*, 9 Ves. 103), or to the husband of the lady on whose marriage it was settled, (*Collis* v. *Collis*, 2 Sim. 365), of course is answerable: and the fact, that in any of these cases the trustee has exposed money of his own to the same hazard, will not discharge him; see *Langston* v. *Ollivant*, G. Coop. 33; for, however morally exculpatory this fact may be as to the motive of the act, it does not shew its legal propriety; nor would the circumstance that a profit has accrued to the testator's estate *on the*

POWERS AND DUTIES OF TRUSTEES.

whole, by lending money on securities of the same nature, (which in the case referred to were Jamaica bonds yielding interest at 8 per cent.), exonerate an executor from liability for a loss occasioned by the insolvency of the borrower in any particular instance. *Adye* v. *Feuilleteau*, 1 Cox, 24. [But a loan on a promissory note has been held not to be a devastavit at law. *Webster* v. *Spencer*, 3 B. & Al. 360.]

Permitting money to remain out on personal security.

So it is clear, that an executor cannot without danger permit any part of his testator's estate to remain out on personal security, on which he (the testator) had invested it in his lifetime. Thus, in *Lowson* v. *Copeland*, 2 B. C. C. 156, an executor was charged with a sum of 100*l.* lent by the testator on bond, which the executor had not after many years received, though he had, it seems, made various applications for it. It did not appear whether the debt had become irrecoverable, or not. In *Orr* v. *Newton*, 2 Cox, 276, indeed, Lord Camden appeared disposed to give to an executor much more extensive indulgence; but, in the case before his Lordship, the money neglected to be called in was secured by a mortgage. Had it been a personal security only, the lenient doctrine of this Chancellor (the effect of which went to allow executors to defer the collection of the assets until the money was actually wanted for the purposes of the trust) would not have been admissible, according to more recent as well as prior decisions: for, in *Powell* v. *Evans*, 5 Ves. 839, executors who had allowed 300*l.*, part of the testator's residuary estate, to continue on the bond of two persons as principal and surety, for three years after the testator's decease, when one obligor became bankrupt and the other absconded, were fixed with the loss, *though there was no express trust for conversion and investment, and though the money was not required for the payment of the pecuniary legacies*, which were contingent. [See *Bailey* v. *Gould*, 4 You. & C. 226; *Att.-Gen.* v. *Higham*, 2 You. & C. C. C. 634; *Carrey* v. *Bond*, 12 Law J., N. S., Ch., 484; ante, Vol. 5, p. 295.] Of course, the general indemnity clause will not relieve an executor or trustee who has disregarded an express injunction to call in a debt within a prescribed period. *Mucklow* v. *Fuller*, Jac. 198.

Leaving unsecured debts outstanding.

The observations which have been made with respect to personal securities will apply with still greater force to mere outstanding debts not secured *at all*, which it is incumbent on an executor or trustee to call in with the utmost dispatch. See *Eagleton* v. *Kingston*, 8 Ves. 467; *Platel* v. *Craddock*, 1 C. P. Coop. 481. And a promissory note not producing interest is of this nature, being merely evidence of a debt, and not a security. *Ryder* v. *Bickerton*, 3 Swanst.

POWERS AND DUTIES OF TRUSTEES.

80. Where certain stock in trade, household furniture, &c., had been by a marriage settlement vested in trustees, who were to permit the husband to possess the property, he paying 800*l.* by eight equal annual instalments, and the trustees received only 250*l.* in the eight years, though they made numerous applications, it was held, that they were bound to make good the deficiency occasioned by the husband's bankruptcy. It was objected that the loss had arisen not from the neglect of the trustees, but from the determination against them of a nice point of law, it having been most unexpectedly decided, that the property in question was in the "order" and "disposition" of the bankrupt. (See *Darby* v. *Smith*, ante, Vol. 5, p. 288). But the Master of the Rolls observed, that, even supposing the trustees to be right in saying that this was a very doubtful question, and they could not look to the possibility of its being so decided, yet if they had been already guilty of negligence, they must be responsible for any loss in any way to that property; for whatever might be the immediate cause, the property would not have been in a situation to sustain that loss, if it had not been for their negligence. If they had taken possession of the property, it would not have been in the bankrupt's possession. *Caffrey* v. *Darby*, 6 Ves. 488. [See *Fyler* v. *Fyler*, 3 Beav. 568; *Kellaway* v. *Johnson*, 5 Beav. 319. So trustees or executors will be held answerable for arrears of rents not recovered, unless they give some evidence to shew that they used all reasonable diligence, and that it was irrecoverable; *Tebbs* v. *Carpenter*, 1 Madd. 290; which has been characterised as a very strong decision, 1 Myl. & Cr. 95. As to the prudence in particular cases of taking security for a simple contract debt, instead of instituting a suit, see *Walker* v. *Symonds*, 3 Swanst. 71.]

Discretion allowed where the property is peculiar.

[But an executor must be allowed some discretion as to the time and mode of converting the assets where the circumstances are special. Thus, where part of the assets consisted of Mexican bonds, it was held, that, notwithstanding a direction to sell with all convenient speed, (which expressed no more than what is the executor's duty in every case), the executor was not bound to sell immediately; and that, having acted with reasonable discretion, he was justified in delaying the sale for a year and seven months, and ultimately selling at a less price than might have been realised by an earlier sale; and the fact that his co-executor pressed for an earlier sale made no difference, as each was entitled to exercise his own discretion. *Buxton* v. *Buxton*, 1 Myl. & Cr. 80.]

Mortgage se-

2. The next step in the duty of a trustee, who is about to invest

POWERS AND DUTIES OF TRUSTEES.

curities in regard to *value*.

on a mortgage or any other private security, is to ascertain that it is of ample value. The rule of prudence, in regard to mortgage securities of *land*, is generally considered to be, not to extend the loan beyond two-thirds the value; and trustees, it is conceived, would be safe in acting on such a rule, unless the value of the property were evidently enhanced by circumstances of a temporary and fluctuating nature. A larger surplus, too, would be requisite in the instance of houses and other buildings, these being liable to decay and deterioration; à fortiori, if the value depended on the prosperity of a trade, or was derived from any other precarious source. It is obvious, that an investment, once ample, may afterwards become deficient; and, in such case, the propriety of the original investment would not protect the trustee against the consequence of his subsequent neglect to call in the money on the depreciation of the security. [Circumstances of this nature came under consideration in the case of *Stickney* v. *Sewell*, 1 Myl. & Cr. 8, where executors, who were empowered to invest money on Government, real, or personal security, lent 3000*l.* to a firm, in which one of the executors was partner, on a mortgage of property of the respective partners, comprising a dwelling-house, two mills, and some land. The loan was continued from 1815 to 1831, when the borrowers became bankrupt, and the property on a sale produced less than 2000*l.* The executors were held to be liable to make good the deficiency, although it appeared that the security was ample at the time of the investment, and that the loss had been occasioned by the great depreciation in mill property in the neighbourhood. The following extract from the judgment of Sir C. C. Pepys, M. R., will shew the grounds of his decision, and is valuable as containing much general doctrine:—"The result being," said his Honor, "that the trust money, to the amount of 750*l.* besides interest, is lost, the burden of proof of sufficient value lies upon the executors, To advance two-thirds, is admitted to be within the rule of ordinary prudence; but that is with reference to property of a permanent value, as freehold land. The same rule does not apply to property in houses, which fluctuates in value, and is always deteriorating. Nearly twenty years have, in the present case, elapsed between the investment and the loss. Twenty years' wear and tear of a house necessarily lessens its value. The observation, that the rule as to lending two-thirds is good only with reference to property of a permanent value, applies particularly to the house in Yarmouth, and, in some degree also, to Secker's [one of the partners] part of the property. There were only sixteen acres of land, comprising but a small part

Stickney v. *Sewell*.

POWERS AND DUTIES OF TRUSTEES.

of the value of 3500*l.*, put upon his part of the property by the witnesses. One of the witnesses states, as a cause that raised the value, that there was only one other windmill there in 1815, whereas now there are three. You cannot say that that is a proper investment which derives its value from the accidental absence of competition in trade. There is no evidence of a valuation having been made in the year 1815. There is another view of this case, which is not strictly within the finding of the Master; namely, that the rent of Secker's property up to 1816 was 250*l.* and afterwards 180*l.*, so that, one year after the investment, the annual value fell so much as 70*l.* Suppose this investment had not been made for the executors' own benefit, and this fall had come to their knowledge; would they have permitted the money to remain on an investment which had fallen so much in value in one year? The utmost value the defendant's witnesses put upon this part of the property in 1815 was 3500*l.*; and they say that property of that description is estimated at twenty-five years' purchase. Now 250*l.* at twenty-five years' purchase would be 6250*l.*, and even at 180*l.* it would be 4500*l.* This shews, therefore, that there is a great want of accuracy in the statements of these witnesses as to value. So, if the rent of the house was only 50*l.* in 1815, it is impossible that the house could have been worth 1200*l.*"]

Trustee improperly retaining monies, or selling stock, is chargeable with loss from rise in stocks.

A trustee, who has retained in his hands a sum of money which his trust required him to invest in Government security, will be liable to make good any loss arising from the subsequent advance of the stocks, or, in other words, to pay the difference between the price of stock at the time when he ought to have invested it, and the period of actual investment. Under this rule, where a sum of money was bequeathed to trustees, (who were also appointed executors), to be invested in the public funds, and one of the executors retained the money for several years, he was charged with the price of stock at the time when he first had assets sufficient for investment. *Byrchall* v. *Bradford*, 6 Madd. 235. So, if a trustee improperly *sells out* stock and applies the proceeds to his own use, he is compelled to replace the full amount of stock, notwithstanding any advance of price in the interval. *Earl Powlet* v. *Herbert*, 1 Ves. jun. 297; *Pocock* v. *Reddington*, 5 Ves. 794. Under any circumstances, a trustee is not permitted to derive an advantage from his improper act, in consequence of the accidental fluctuation of the stock; the cestui que trust will have the option of claiming either stock or money, in the exercise of which he will of course be governed by the event: if the stock be lower than when the retention or sale took place, he will choose the money; if higher, the stock. In *Earl*

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Powlet v. *Herbert*, 1 Ves. jun. 297, the decree directed the trustee to replace stock which he had improperly sold, and that, if the purchase were made for a less sum than the misapplied stock had sold for, the trustee should add to the investment such a sum of money as would make up the difference. See also *Harrison* v. *Harrison*, 2 Atk. 121; *Bostock* v. *Blakeney*, 2 B. C. C. 653; *Forrest* v. *Elwes*, 4 Ves. 497; *Pocock* v. *Reddington*, 5 Ves. 794; *Bate* v. *Scales*, 12 Ves. 402; *Mehrtens* v. *Andrews*, 3 Beav. 72.

Rate of interest payable by trustees.

The rate of interest payable by trustees varies according to circumstances. The distinctions on this subject seem to have been succinctly and accurately stated by Sir G. F. Hampson, in his Treatise on the Liabilities of Trustees, p. 71, as follows:—"1st, That trustees culpably negligent in permitting trust money to continue unproductive, are charged with interest upon the balances in their hands, for the benefit of their cestuis que trust, at the rate of 4*l.* per cent. per annum. 2ndly, That, when trustees have been guilty of misconduct by withholding their accounts, employing the trust fund in any manner for their own advantage, or failing to make interest upon it at a higher rate than 4*l.* per cent. when they might have done so, by a due compliance with the express terms of their trust, it is at the option of the cestuis que trust whether they shall be charged with interest at the rate of 5*l.* per cent. per annum, or account for the profits which may have been made by the use of the trust property. 3rdly, That sometimes, where trustees have, during a considerable length of time, improperly applied trust money to their own use, annual rests have been made in their accounts, and compound interest, at the full legal rate, charged against them; and where an express trust for accumulation had been long neglected, half-yearly rests were made in trustees' accounts, and compound interest charged against them upon the balances found." *Raphael* v. *Bohem*, 11 Ves. 107, 111; 13 Ves. 411; [see *Att.-Gen.* v. *Solly*, 2 Sim. 518; *Walker* v. *Woodward*, 1 Russ. 107; *Pride* v. *Fooks*, 2 Beav. 430]; *Tebbs* v. *Carpenter*, 1 Madd. 300. See also *Radcliffe* v. *Graves*, 1 Vern. 196; *Lee* v. *Lee*, 2 Vern. 548; *Newton* v. *Bennett*, 1 B. C. C. 359; *Perkins* v. *Baynton*, Id. 375; *Lowton* v. *Copeland*, 2 B. C. C. 293; *Franklyn* v. *Frith*, 3 B. C. C. 433; *Ex p. Shakeshaft*, Id. 197; *Forbes* v. *Ross*, 2 Cox, 111; *Sammes* v. *Rickman*, 2 Ves. jun. 36; *Younge* v. *Combe*, 4 Ves. 101; *Piety* v. *Stace*, Id. 620; *Longmore* v. *Broom*, 7 Ves. 124; *Rocke* v. *Hart*, 11 Ves. 58; *Dornford* v. *Dornford*, 12 Ves. 127; *Ashburnham* v. *Thompson*, 13 Ves. 402; *Crackelt* v. *Bethune*, 1 Jac. & W. 588; [*Turner* v. *Turner*, Id. 39; *Heathcote* v. *Hulme*, Id. 122; *Binnington* v. *Harwood*, Turn. & R. 477; *Sutton* v. *Sharpe*, 1 Russ. 146; *Bick* v. *Motley*, 2 Myl. & K.

312; *Brown* v. *Sansome*, M'Clel. & Y. 427; *Woodhead* v. *Marriott*, C. P. Coop. 62; *Heighington* v. *Grant*, 9 Law J., N. S., Ch., 142, 10 Law J., N. S., Ch. 13; *Mousley* v. *Carr*, 4 Beav. 49; *Court* v. *Robarts*, 6 Cl. & Fin. 65. As to giving the cestui que trust a share of the profits where the trustee has mixed the funds with his own and employed them in trade, see *Docker* v. *Somes*, 2 Myl. & K. 655, where Lord Brougham, C., in affirming a decree of the Vice-Chancellor, which directed inquiries as to the profits made by trustees of trust monies employed in their trades, thus laid down the general principle:—"Wherever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust estate for his own behoof, the rule is that he shall account to the cestui que trust for all the gain which he has made. Thus, if trust money is laid out in buying and selling land, and a profit made by the transaction, that shall not go to the trustee who has so applied the money, but to the cestui que trust whose money has been thus applied. In like manner, (and cases of this kind are more numerous), where a trustee or executor has used the fund committed to his care in stock speculations, though the loss, if any, must fall upon himself, yet, for every farthing of profit he may make, he shall be accountable to the trust estate. So, if he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person from whom he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear that he must account for the profits received by the adventure, or from the concern. In all these cases it is easy to tell what the gains are. The fund is kept distinct from the trustee's other monies, and whatever he gets he must account for and pay over. * * * * Such being the undeniable principle of equity, can the court consistently draw the line as the cases would seem to draw it, and except from the general rule those instances where the risk of the malversation is most imminent,—those instances where the trustee is most likely to misappropriate,—namely, those in which he uses the trust fund in his own traffic?" After examining the cases, and shewing that the only reason for ever abstaining from the inquiry as to the profits made by the trustee must have been the difficulty of ascertaining them, his Lordship continued:—"That the parties whose funds have been misapplied should in every case have their option of receiving either the actual profits made, or interest at 4*l.* or 5*l.* per cent., according to circumstances, appears a rule exposed to no serious objection; and although the court, moved by special circumstances,

Trustee mixing funds with his own, and using them in trade, must account for a proportionate part of the profits.

Docker v. *Somes.*

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may allow rests without compound interest, yet this seems, generally speaking, much less advisable than an account of actual profits. Should any serious difficulty arise in tracing and apportioning the profits, this may be a reason for preferring a fixed rate of interest in that case." So, in *Burton* v. *Wookey*, 6 Mad. 367, where the plaintiff and defendant entered into partnership to deal in calamine; the defendant, who was a shopkeeper, to take the active part in the concern, and purchase the calamine from the miners, in whose neighbourhood he lived. Many of the miners had been the defendant's customers. After some time he commenced a new course of dealing with them, paying for the calamine by goods, instead of keeping the transactions distinct. Sir J. Leach, V. C., decreed an account of the profit made by the defendant in his barter of goods, and declared the plaintiff entitled to an equal division of that profit.]

Using fund in trade.

Burton v. *Wookey*.

Delay in investing, where the trustee is confined to a particular security.

[Where an executor was directed by the testator to invest the residue of his estate on *good freehold security*, and he retained in his hands, for more than two years, a balance of more than 300*l*., part of it deposited with his banker, alleging that he had not been able to find a proper investment, Sir L. Shadwell, V. C., held, that, in the absence of any proof of negligence, the executor was not answerable for interest. *Wyatt* v. *Wallis*, 8 Jur. 117.]

Rule where trustees have changed a proper for an improper investment.

[Where trustees have been guilty of a wanton change from a proper to an improper investment, they have been held bound to replace the specific security, or account for the proceeds and interest at 5*l*. per cent. without rests, at the option of the cestuis que trust; *Crackelt* v. *Bethune*, 1 Jac. & W. 586; but where there are extenuating circumstances, 4*l*. per cent. is allowed; Ib.; *Tebbs* v. *Carpenter*, 1 Mod. 290; and even the option of charging the trustee with the proceeds *and interest* at all has been refused. *O'Brien* v. *O'Brien*, 1 Moll. 533. Of course, when the cestuis que trust have the option as against the trustee himself, they have it by way of proof as against his estate on his bankruptcy. *Ex p. Gurner*, 1 Mon. D. & D. 497.]

As to making rests against trustees.

Though rests are made against an executor who has improperly employed trust monies, yet, on the other hand, if he have advanced monies of his own on behalf of the testator's estate, he will be allowed interest on such advances only from the time of a balance being struck on the Master's report; for, until then, it cannot be ascertained that the executor has not money in his hands. *Gordon* v. *Trail*, 8 Price, 416.

As to power of

Trustees usually have a power to vary securities, which is to be

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exercised either at their own discretion, or with the consent of the person entitled to the current income, (if of competent age); and unless so empowered, they ought not to deal in this manner with the trust funds. The ordinary power to change investments is considered as given with a view to the security of the property, and not to enable the donees to affect the relative rights of the parties beneficially interested; and therefore, where a testator bequeathed the stocks and funds standing in his name in the Bank of England to trustees, in trust for his wife for life, and at her death to A. absolutely, and he empowered the trustees to transfer the stock to any other Parliamentary funds, and again to change the same as they should think proper:—it was held, that the trustees were not authorized to sell out Long Annuities, and invest the proceeds in the purchase of 3*l.* per Cent. Consols, by which the gift to the wife would have been diminished for the benefit of the ulterior legatee. *Lord* v. *Godfrey*, 4 Madd., 455. [See *Fitzgerald* v. *Pringle*, 2 Moll. 534; *Stuart* v. *Stuart*, 3 Beav. 430; *Lee* v. *Young*, 2 You. & C. C. C. 532.] The reader will scarcely require to be cautioned against confounding the principle of *Lord* v. *Godfrey* (in which the bequest was specific) with that which regulates the conduct of executors and trustees under a general trust for conversion, which will be discussed in another place. [Where part of a residuary estate, which was liable to conversion under the ordinary rule, consisted of life annuities and policies of insurance, the court, being of opinion that that course would be most beneficial for all parties, directed that no sale should be made, but that the policies should be kept up. *Glengall* v. *Barnard*, 5 Beav. 245.]

changing securities.

Not to be exercised unfairly.

The Court of Chancery will control the discretion of trustees in regard to this part of their duty, if any attempt be made to exercise the power in a manner palpably mischievous. See *De Manneville* v. *Crompton*, 1 Ves. & B. 359.

Where trustees are empowered to lend money, or do any other such act with the consent of a third person, *previous* consent must be obtained, the want of which cannot always be compensated by a *subsequent* approbation. And, therefore, where the trustees of a marriage settlement were authorized, with the consent of the wife, if living, to be testified by writing attested by two witnesses, but in case of her death, then in their own discretion, to advance certain Bank Annuities, not exceeding 1500*l.*, to the husband; and the trustees advanced the stock without the consent of the wife, who, *afterwards*, by a deed attested in the manner required by the power, declared her approbation thereof, the trustees were held to be liable

Want of *previous* consent not compensated by *subsequent* approbation.

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to refund the 1500*l.* stock: Sir J. Leach, V. C., observing, "that the actual advance of the money to the husband, who perhaps had spent it, created a pressure upon the judgment of the wife, which gave to her subsequent approbation a very different character from the free consent required by the settlement." *Bateman* v. *Davis*, 3 Madd. 98.

And in a much earlier case, Lord Hardwicke held, that, where trustees were to place out a sum of money on security, with the approbation of another person, who was not apprized of the nature of the security until afterwards, her subsequent approbation was not sufficient; but his Lordship thought, (and the idea is important), that the manner in which the money was laid out was so palpably contrary to the trust, being lent on a promissory note without interest, that the trustee would not be excused, *even by obtaining the consent required*. *Ryder* v. *Bickerton*, 3 Swanst. 80, n. [In *Cocker* v. *Quayle*, 1 Russ. & M. 535, trustees were empowered, with the written consent of the wife, to lend trust money to the husband upon his bond. They lent it to him with her verbal consent only, and without taking his bond, and he having become bankrupt, the trustees were held responsible for the loss. Where a testator appointed two trustees with power to make advancements to his children, and one only (the mother of the children) acted, without applying to have a new trustee appointed, she was held not to be entitled to any allowance in respect of advancements made by her, or even to an inquiry as to the circumstances. *Palmer* v. *Wakefield*, 3 Beav. 227.]

Question, where money raised out of land is lost by insolvency of trustees.

Where a sum once raised out of land has been lost by the insolvency of the trustees, the question sometimes arises, whether the *estate* is exonerated from the charge. In an *Anonymous case*, Salk. 153, a man limited an estate to trustees, for payment of debts and legacies. The trustees raised the whole money, but converted it to their own use; so that the debts and legacies remained unpaid. It was resolved, in Dom. Proc., that the heir should have the land discharged, and the legatees should take their remedy against the trustees; for the estate was debtor for the debts and legacies, but not for the faults of the trustees, and therefore was only liable so long as the debts, &c. should or might be paid; for it was said, that, where the land has once borne its burden, and the money is raised, it is discharged, and the trustees liable. So, in *Juxon* v. *Brian*, Pr. Ch. 143, the Lord Keeper ruled, that, where lands are devised to trustees, to raise money for several purposes, and they raise the money out of the profits, the land is thereby discharged,

and the persons concerned must resort to the trustees. [See *Cherry* v. *Ferrers*, cit. *Tompkins* v. *Tompkins*, Pr. Ch. 399.] So, in *Carter* v. *Barnardiston*, 1 P. W. 505, where a testator devised that his executors should receive the profits of his real estate, for the payment of his debts and legacies, and then over, and it was contended, that the executors should hold over, notwithstanding that they misapplied the profits, Parker, C., observed, that it would be very strange to say, that, because one of the executors did not apply the rents, as he ought to have done, towards payment of the debts, therefore, he that acted wrongfully should hold over. This would be directly to let a man take advantage of his own wrong, and was the same as to say, that the longer the executors misapplied the profits, the longer they should hold the estate, nay, they should hold it purely because they did wrong. That, therefore, this term or uncertain interest should determine at such a time as the executors might have paid the debts, if they had duly applied the rents, &c. And as to the profits misapplied, the creditors must pursue the trustees for such profits. But, in *Harrison* v. *Cage*, 2 Vern. 85, where land was charged by deed with a portion of 500*l.*, and the trustee, after raising the money out of the rents, became insolvent, having given to the portionists a security, by judgment, to pay the money when raised; the Master of the Rolls doubted and took time to consider whether the land was discharged, the words being to raise *and pay*, and the money, though raised, not having been paid. [From Mr. Raithby's note, it appears to have been decreed that the deficiency should be again raised out of the land.]

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In *Hutchinson* v. *Lord Massarene*, 2 Ball & B. 49, where Lord M. conveyed certain estates to trustees appointed by his creditors, in trust to raise money by mortgage of his estate and perception of rents, for the liquidation of his debts, and one of the trustees failed with money in his hands; Lord Manners held, that the loss should fall not on Lord M., but on the creditors, by whom the trustees were appointed, and whose agents they were. The deed contained a power authorizing the creditors to appoint new trustees.

As to the *custody* of trust property.

In regard to the *custody* of trust property, the general rule is, that a trustee is bound to preserve it with the same care that he reasonably bestows upon his own property, and no more; *Massey* v. *Banner*, 1 Jac. & W. 241; *Attorney-General* v. *Dixie*, 13 Ves. 534; which seems to be the fair limit of the responsibility of a merely *honorary* bailee. [Vide ante, Vol. 1, p. 260.] If, therefore, a trustee be robbed, he is not liable to make good the loss. *Morley* v. *Morley*, 2 Ch. Cas. 2. In accordance with this principle, Lord

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Hardwicke held, that, where an administratrix had delivered goods to her solicitor, in order that they might be tendered to a third person, and the solicitor was robbed, she was not liable. *Jones* v. *Lewis*, 2 Ves. sen. 240. [And an executor is not bound to insure or to keep up his testator's insurance upon a leasehold house. *Bailey* v. *Gould*, 4 You. & C. 221. See *Croft* v. *Lyndsey*, 2 Freem. 1 Whether an executor is entitled *at law* to the same indulgence as a common bailee has, however, been doubted. Per Lord Ellenborough, *Crosse* v. *Smith*, 7 East, 258.]

As to liability on failure of bankers, &c.

The failure of a banker, in whose hands an executor or trustee has, in the regular course of his duty, placed trust-money, will not, it seems, render him responsible for the loss; *Belchier* v. *Parsons*, Amb. 219; *Horsley* v. *Chaloner*, 2 Ves. sen. 85; unless, instead of placing it to a distinct account, he has mixed the money with his own; which circumstance would undoubtedly be a ground for charging him. [For, in that case, if any intermediate failure of the trustee happen, his estate gets the benefit of the remittance, and the trust-estate none; or the bankers may have a right of set-off.] *Wren* v. *Kirton*, 11 Ves. 377; *Fletcher* v. *Walker*, 3 Madd. 53; *Massey* v. *Banner*, 4 Madd. 413; [*Macdonnell* v. *Harding*, 7 Sim. 178.] In *Churchill* v. *Lady Hobson*, 1 P. W. 243, an executor continuing the trust-monies in the hands of his co-executor, who had been the testator's own banker, was held not to be chargeable. In *Knight* v. *Lord Plymouth*, 3 Atk. 480, a receiver transmitting money through an agent, for the convenience of remittance, was held not to be responsible for the agent's failure. There, the agent was not a banker; but the principle could not be safely acted upon in regard to such a person at the present day, when the establishment of banks has become more general. In *Rowth* v. *Howell*, 3 Ves. 565, executors were exonerated from liability on account of the failure of a banker who had misappropriated certain negotiable securities which the testator himself had deposited in his hands. It does not appear what time had elapsed since the death of the testator; but it is rather to be inferred that it was not long. The executors were in treaty for a mortgage, which was delayed on account of difficulties in the title; and they, immediately on discovering the misconduct of the banker, brought an action against him, which was defeated by his insolvency and death. In *Adams* v. *Claxton*, 6 Ves. 226, a sum of money was placed at a bank, then in good credit, by the agent of the trustees, pending an appointment of new trustees; and it was held, that the trustee was not liable for the loss incurred by the failure of the bankers.

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In the case of *France* v. *Woods*, (not reported), a testator having directed his trustees to lay out his personal estate in the purchase of lands, they, in the execution of their trust, made a purchase, and, to enable them to complete the contract, sold out stock belonging to the testator's estate, leaving the proceeds in the hands of the bankers, who were the same persons as the testator employed. Some delay unexpectedly arose in the completion of the contract; and in the meantime the bankers became bankrupt. It was attempted to onerate the trustees with the loss; but Sir J. Leach, M. R., was of opinion that they were not liable: his Honor observing, that, if trustees were to be responsible for such an accident as this, no respectable person would be induced to undertake the office. Rolls, July 23, 1829, MS. [But where, under similar circumstances, the trustee invested the money in Exchequer bills until he should find an eligible mortgage, and deposited those bills with bankers without taking any precaution to separate them from the bankers' general property, he was held to be answerable for the failure of the bankers; for though, had he deposited the money itself with them, he might not have been chargeable, yet, having adopted the other course, he did not take all the precautions in his power. *Mathew* v. *Brise*, 12 Law J., N. S., 263; Rolls.]

MS. case of *France* v. *Woods*.

Trustee taking any course must use all the precautions which that course admits of.

[In *Salway* v. *Salway*, 4 Russ. 60, 2 Russ. & M. 215; *White* v. *Baugh*, 3 Cl. & Fin. 44, S. C., ante, vol. 2, p. 79, a receiver was fixed with a loss arising from the failure of bankers, on the ground, among others, that he had placed the money out of his own absolute control, by giving to other persons the power of interfering with his disposition of it. See *Fuller* v. *Knight*, 12 Law J., N. S., Ch., 182. Where it was the duty of executors forthwith to invest money in the funds, they were held liable for the failure of bankers with whom they had deposited it for safe custody, and in whose custody they allowed it to remain for nearly a year. *Moyle* v. *Moyle*, 2 Russ. & M. 710. See *Darke* v. *Martyn*, 1 Beav. 525; *Bacon* v. *Clark*, 3 Myl. & Cr. 294.]

Executors held chargeable with a loss after professed renunciation.

In *Doyle* v. *Blake*, 2 Sch. & Lef. 231, executors who had renounced were eventually charged with a loss occasioned by the insolvency of an administrator with the will annexed, on the ground of acts performed before renunciation, the effect of which, it was considered, was to make the administrator their agent. Lord Redesdale observed, that executors must either wholly renounce, or, if they act to a certain extent as executors, and take upon them that character, they can be discharged only by administering the effects themselves, or by putting the administration into the hands of a court of equity. The defendants

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had not taken either of these courses; they put the assets into the hands of the person in question, and procured him to be appointed administrator. His Lordship thought, therefore, that he was to be considered their agent, just as if they had given him a power of attorney. The circumstances of this case were special, and too long to be detailed here. [However, as a general rule, it seems that an executor who does not prove, but interferes with the assets, is not answerable, except for himself personally. *Orr* v. *Newton*, 2 Cox, 274; *Lowry* v. *Fulton*, 9 Sim. 115, et vide infra, p. 718.]

Clough v. *Bond*. Husband of administratrix held answerable for loss arising from payment of money to bankers in the names of himself and the co-administrator of his wife.

[The extent to which the application of the doctrine under consideration may be carried was well illustrated in *Clough* v. *Bond*, 8 Sim. 594, 3 Myl. & Cr. 490; where, administration having been granted to T. R. Dixon and E. Bond, (the wife of J. Bond), the son and daughter of the intestate, the assets, consisting chiefly of Government stock, were sold in May, 1831, and the proceeds paid into a banking-house, to the joint account of T. R. Dixon and J. Bond, the husband, with the consent of the wife; and soon after, with the exception of the share of one of the next of kin, who was abroad, drawn out and distributed. In December, 1831, the husband died, and in October and November, 1832, T. R. Dixon drew out the balance and absconded. Lord Cottenham, C., in holding that the estate of J. Bond was liable to make good the loss, said, "It will be found to be the result of all the best authorities upon the subject, that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure and depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost, without any fault of his, he is liable; *Phillips* v. *Phillips*, Freem. 11; or if he leave money due upon personal security, which, though good at the time, afterwards fails. *Powell* v. *Evans*, 5 Ves. 839; *Tebbs* v. *Carpenter*, 1 Madd. 290. And the case is stronger if he be himself the author of the improper investment, as upon personal security or an unauthorised

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fund. Thus, he is not liable, upon a proper investment in the 3*l.* per Cents., for loss occasioned by the fluctuations of that fund; *Peat* v. *Crane*, 2 Dick. 499, n.; but he is for the fluctuations of any unauthorized fund; *Hancom* v. *Allen*, 2 Dick. 499, n.; *Howe* v. *E. of Dartmouth*, 7 Ves. 137, 150. So, where the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted, necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative. But if, without such necessity he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator. *Langford* v. *Gascoyne*, 11 Ves. 333; *Lord Shipbrook* v. *Lord Hinchinbrook*, 11 Ves. 252; 16 Ves. 477; *Underwood* v. *Stevens*, 1 Mer. 712. And see *Hanbury* v. *Kirkland*, 3 Sim. 265. Applying these principles to the present case, the inquiry is necessarily confined to two points: first, was the payment into Child's of the money in question in the joint names of Mr. Bond and Mr. Dixon a proper mode of deposit; and, if not, secondly, was the loss occasioned by such mode of deposit? Bond had nothing to do with the estate, except as husband of the administratrix. During the coverture he was entitled to interfere in her right; but that authority was determinable with the determination of the coverture. In the event, therefore, which happened, of his death before his wife, her authority would remain to be exercised by herself alone, and so she would be enabled to control her co-administrator—a security to the estate of which he had no right to deprive it. By depositing the money in his own name and that of the co-administrator Dixon, he did exclude the administratrix from ever possessing this control, so far as affects the funds in question; and, in the event of Dixon's death before him, give to himself the absolute power over it; and, in the event which has happened, of his dying first, enable Dixon to appropriate it to himself, without the control of his co-administratrix. This mode of deposit, therefore, was an act by which, without necessity, one of the personal representatives was excluded who had at one time possession, and by which exclusive possession was likely to vest in a person not entitled to it; and that event having happened, and such person having by virtue of such possession appropriated the fund to himself, there can be no doubt that the deposit was improper, and that it has been the cause of the loss. The principle, therefore, of the cases referred to subjects Bond's estate to the liability of making good this fund; for although the wife was the personal representative, and she survives, yet the devastavit con-

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sisted in the improper deposit which took place during the coverture; the money lost was part of the estate which came to the hands of the husband, and from which nothing has taken place that can discharge him. He was himself the author of the devastavit, and his estate is liable, as is fully illustrated by Lord Redesdale in *Adair* v. *Shaw*, 1 Sch. & Lef. 243." See *Kilbee* v. *Sneyd*, 2 Moll. 186: *Ex p. Griffin*, 2 Gl. & Ja. 114; *Walker* v. *Symonds*, 3 Swanst. 1, 58.]

Payment to forged order.

[Payment of money under a forged authority of course does not discharge the trustee. *Ashby* v. *Blackwell*, 2 Eden, 299, 302.]

Responsibility for the acts of each other.

2. *Liability of Executors and Trustees for the Acts of each other, and generally as to Acquiescence by the Cestuis que Trust.*]—An executor who merely *permits* his co-executor to possess himself of a fund receivable by them respectively, by virtue of their common office, is not responsible for its application; but if, by any positive *act* or agreement of one executor, money gets into the hands of his companion, they are both answerable. And therefore, where, in an action against two surviving executors, it appeared that they had been joint executors with their mother, who was dead, and who had wasted goods of the testator, of the value of 600*l.*, it was held, that the defendants were not chargeable with this sum; for that clearly one executor was not to be charged by the devastavit made by his companion. *Hargthorpe* v. *Milforth*, Cro. El. 318. See *Gill* v. *Attorney-General*, Hardr. 314 (*c*).

Not answerable for *permitting* money to be received by co-executor.

Responsibility arising from concealment of or acquiescence in breach of trust by another.

(*c*) But a person not originally responsible in regard to the receipt of money by another, may render himself so by his concealment of the fact of its subsequent misappropriation. *Boardman* v. *Norman*, 1 B. C. C. 68. [And an executor or trustee who has proved the will or accepted the trusts will be answerable, if he stand by, with knowledge that his co-executor or co-trustee is committing a breach of trust. Thus, where a trader bequeathed the residue of his estate to his co-partner and W. B., in trust for conversion and investment for the benefit of his wife and children; and both executors proved the will, and the surviving partner employed the assets, with the approbation of the widow, in carrying on the testator's trade; W. B., who was not proved to have interfered, was held, on the mere ground of his knowledge of the fact, and his neglect to perform the duty which he had undertaken to be answerable for. *Booth* v. *Booth*, 1 Beav. 125, Lord Langdale, M. R., said, "On the authorities and the established practice of the Court, a trustee who stands by and sees a breach of trust committed by his co-trustee becomes responsible for that breach of trust." Upon the principle that a cestui que trust who authorizes a breach of trust (not amounting to a moral fraud) undertakes to indemnify the trustee, the widow's interest was declared liable in the first instance. So, in *Lincoln* v. *Wright*, 4 Beav. 327, two executors were made answerable for allowing a third executor to retain in his hands an ascertained residue, bequeathed upon trusts. An attempt to fix the tenants for life with the primary responsibility on the ground of interference failed; but the general prin-

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Aliter where he does a positive act, placing it at the sole disposal of the co-executor.

On the other hand (by way of illustration of the second branch of the distinction in question), where two executors joined in a reconveyance of a mortgage, and in a receipt for the mortgage debt, though one only received the money, both were held to be responsible. *Scurfield* v. *Howes*, 3 B. C. C. 90. See also *Murrell* v. *Pitt*, 2 Vern. 570; *Sadler* v. *Hobbs*, 2 B. C. C. 114, overruling *Westley* v. *Clarke*, 1 Eden, 357. So, where a bag of money had been delivered, shortly after the testator's death, to one of three executors, in the presence of the others, and the executor to whom it was delivered handed it over to one of his co-executors, it was held, that he was answerable for the due application of the money by the latter. "The rule," Sir W. Grant said, "is, that, if an executor does any act by which money gets into the possession of another executor, the former is equally answerable with the other: *not where an executor is merely passive, by not obstructing the other in receiving it.*" *Langford* v. *Gascoyne*, 11 Ves. 333. See also *Townsend* v. *Barber*, Dick. 356. And it is clear, that, in a court of equity, an executor cannot examine his co-executor, in order to prove the due application of a sum of money which he has paid over to the latter. *Dimes* v. *Scott*, Turn. & R. 358. It does not appear, that, in *Langford* v. *Gascoyne*, there was any distinct understanding between the executor who paid, and the executor who received the money, respecting its destination. But, even if there had been, it seems that the result would not have been different; for an executor cannot divest himself of responsibility, by employing his co-executor to perform an act of their common duty, which might, with equal convenience, have been performed by himself (*d*). Thus, in an action at law by

ciple was fully recognised by the court. So, in *Mucklow* v. *Fuller*, Jac. 198, one of two executors and trustees was held not to be protected by the ordinary indemnity clause from the consequences of his neglecting to enforce payment of a debt due by the other to the testator's estate. See *Att.-Gen.* v. *Holland*, 2 You. & C. 699. But an executor or trustee is not answerable for standing by and permitting his colleague to misapply the funds, if he had no reason to suspect that they were being misapplied. *Williams* v. *Nixon*, 2 Beav. 472.]

(*d*) But see *Davis* v. *Spurling*, 1 Russ. & M. 66; where Sir J. Leach, M. R., seemed to think, that an executor paying over a debt to his co-executor, for a special purpose, as, for the payment of a particular debt, would not be responsible. But the case did not raise the point; for it merely decided, (what might seem to have been too clear to call for decision), that, where there were two executors, *one* of whom only had an express power of sale over a real estate, and the proceeds of which were to be applied as part of the personalty, and this executor employed his co-executor, who was an auctioneer, *and was not included in the power*, to sell the estate for him, the auctioneer incurred no responsibility by paying over the purchase-money to his co-executor, whose agent he was. [See *Law-*

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a bond creditor against an executor, it was held, that the latter could not discharge himself under the plea of plenè administravit, by shewing that he had paid the money over to his co-executor, for the purpose of satisfying the plaintiff's debt, but who had misapplied it, by retaining the money in satisfaction of a simple contract debt owing from the testator to himself. *Crosse* v. *Smith*, 7 East, 246; [*Graham* v. *Keble*, 2 Dow, 17.] Indeed, Lord Rosslyn, on one occasion, (see *Balchen* v. *Scott*, 2 Ves. jun. 678), discharged an executor, who had proved the will, but had never acted in its execution, and who, on receiving a letter by the post, enclosing a bill of exchange from a debtor of the testator, immediately transmitted it to the acting executor. But the case seems to have been shaken by subsequent decisions; and certainly, the doctrine prevalent in the Court of Chancery, at the time that his Lordship held the Great Seal, and Lord Alvanley (see his judgment in *Hovey* v. *Blakeman*, 4 Ves. 606) presided at the Rolls, was decidedly more favourable to trustees than that which had before or has since obtained there.

Distinction between executors and trustees joining in a receipt.

In a long line of cases we find it laid down as a settled rule, that, where two *executors* join in giving a discharge for money, and one of them only receives it, they are both answerable; because there is no necessity for both to join in the discharge, the receipt of either being sufficient: but if *trustees* join in giving a discharge, and one only receives, the other is not answerable, because his joining in the discharge was necessary. *Aplin* v. *Brewer*, Pre. Ch. 173; *Fellowes* v. *Owen*, 2 Vern. 504, 515; *Murrell* v. *Cox*, Id. 570; *Churchill* v. *Lady Hobson*, 1 P. W. 241; *Belchier* v. *Parsons*, Amb. 219; *Leigh* v. *Barry*, 3 Atk. 584; *Chambers* v. *Minchin*, 7 Ves. 197; *Brice* v. *Stokes*, 11 Ves. 324; [*Gregory* v. *Gregory*, 2 You. & C. 316; *Williams* v. *Nixon*, 2 Beav. 475, vide infra, p. 724, n.] Where the same persons are both executors and trustees, the application of this distinction would of course raise the question, whether the act were done in the one character or the other. And here it may be noticed,

rence v. *Blake*, 8 Cl. & Fin. 504, and the next note. It is doubtful, whether, at law, an executor can discharge himself in respect of assets once in his hands, by a plea of payment to his co-executor for a specific purpose; even where the one executor does not, and the other does, reside at the place where the money is to be applied, infra, p. 724, n. In *Crosse* v. *Smith*, cited in the text, this was the case, the remittance having been made by the executor in Southampton to the executor in London, for the express purpose of paying the debt due to the plaintiff, who resided in London. See per Lord Redesdale, infra, p. 720, n. If the executor can shew that the specific money which he has entrusted his co-executor with has been duly applied, he will not be answerable for an equivalent portion of other assets originally in the hands of his co-executor, and misapplied; infra, p. 727.]

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that an executor who is appointed a trustee of personalty cannot assume the executorship and renounce the trust (*e*). *Mucklow* v. *Fuller*, Jac. 198. [*Booth* v. *Booth*, 1 Beav. 125; *Lincoln* v. *Wright*, 4 Beav. 427.] The distinction in question, however, has been somewhat broken in upon in favour of executors. Lord Rosslyn, on more than one occasion, unhesitatingly rejected it. See *Adye* v. *Feuilleteau*, 1 Cox, 24; and though Lord Eldon has expressed his disapproval of the infringement of the rule, (see 11 Ves. 324), which is enough to induce reluctance on the part of executors to join in *unnecessary* acts, yet the principle on which the responsibility of executors has been placed in the modern cases, namely, as resulting from negligence in regard to the application of the money, rather than directly from the mere act of conformity in joining in the receipt, deprives the distinction of much of its practical significance. One instance certainly occurs, in which an executor was held not to be liable for a sum of money which he not merely permitted his co-executor to receive, but actually paid over to him. Thus, in *Bacon* v. *Bacon*, 5 Ves. 331, where the circumstances were, that the testator had died at Ipswich, leaving two executors, one residing in the neighbourhood, and the other in London. The latter advanced to the former, who had been the attorney and confidential agent of the testator, 700*l.*, in order to pay debts owing in the neighbourhood.

Executor held not responsible for money paid over to his co-executor.

(*e*) [But (though a more severe rule has been in some cases laid down, vide ante, p. 718) it seems that an executor who is also trustee is not bound to take an active part in administering the trusts, and will not be responsible for the consequences of acts done, merely necessary to enable his co-trustee to act. Thus, in a recent case, where stock in the funds and real estate were given by will to F. and M., the testator's executors, upon certain trusts, and were sold with the concurrence of F., who signed the receipts, but did not receive the money; it was held, that F. was not answerable for his default. Lord Cottenham, C., said, "The distinction which has been taken in some cases between the responsibility of executors and trustees does not apply to the present case, because, all the acts in which F. joined being necessary to the administration of the estate, he was in that respect in the same situation as a trustee; an executor, though he proves the will, and thereby places himself in the situation of having control over the testator's property, is not in general bound to act any further, and may be passive or active, only as far as is necessary to enable the other representatives to act in the administration of the estate; but it is part of the proposition, that the act in which he joins should be a necessary and proper act for the purposes of such administration. If it be required for the payment of debts or legacies, an executor is safe in joining in the sale of stock or other property, and permitting another executor to receive the proceeds, as in *Hovey* v. *Blakeman*, 4 Ves. 596; but if he joins in such sale where the money is not required, and he had not reasonable grounds for believing it was so required, he is liable for the money so received, as in *Brice* v. *Stokes*, 11 Ves. 319; and *Underwood* v. *Stevens*, 7 Meriv. 712." *Terrell* v. *Matthews*, 5 Jur. 1074.]

Executor who proves, how far bound to act.

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He afterwards produced to his co-executor a book, containing a list, as he alleged, of debts paid, and obtained a further advance of 500*l.* for the like purpose. The executor who paid these sums stated, that he did so because he considered that he was not justified in putting the estate to the expense of paying them himself. The money was misapplied; and it was held, that he was not liable. The sending the money to his co-executor was the most convenient mode of paying the debts, especially as the executor in the country was acquainted with the testator's accounts and affairs. This case is supported by the approbation both of Lord Eldon (see *Chambers* v. *Minchin*, 7 Ves. 195) and Sir William Grant, (see *Langford* v. *Gascoyne*, 11 Ves. 331), and has been much relied on in every succeeding attempt to raise an exculpatory argument for executors; [see per Lord Redesdale, infra, p. 724, n., *Hanbury* v. *Kirkland*, 3 Sim. 265;] but it has seldom happened that their conduct has entitled them to the protection of its principle, the act of confidence in the co-executor not being justified by all the circumstances which contributed to establish its propriety in this instance.

Trustees not liable for mere junction in receipt for monies may become so for negligence as to their application.

And even in regard to trustees who have *necessarily* (and therefore, so far as respects this mere act, *irresponsibly*) concurred in any receipt, it is to be observed, that, if that concurrence has been given with a view to the fund being employed for a purpose not warranted by the trust, or without due *previous* inquiry into the necessity of raising it, or due *subsequent* care respecting its application when raised, the trustees become responsible, not indeed by means of their joining in the receipt, but of the concomitant negligence. *Ex p. Griffin*, 2 Gl. & Ja. 114. Thus, where a testatrix had bequeathed her property in trust to pay some legacies, and then for certain residuary legatees; and after a suit had been commenced for carrying the trusts of the will into execution, one of the executors and trustees, who resided in London, applied by letter to the other, who was a solicitor in the country, to join in a power of attorney for the sale of some Long Annuities, part of the testatrix's estate, expressing his conviction that it would be advantageous to convert the fund into 5*l.* per Cents. The executor in the country complied, the fund was never invested, and the concurring executor was held to be liable to replace the Long Annuities, Lord Eldon adverting to the fact, that the proposed sale and investment were not a due execution of the trust, and that the executor who had concurred in the power of attorney took no steps to ascertain what use was made of the power, what became of the annuities sold, and whether they were applied in any manner to the trusts of the will. *Chambers* v. *Minchin*, 7 Ves.

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186. [*Hanbury* v. *Kirkland*, 3 Sim. 265; *Broadhurst* v. *Balguy*, 1 You. & C. C. C. 16.] The rule acted upon in these and other cases, though often operating with extreme severity upon individuals, seems indispensable to the protection of trust-property. If trustees were at liberty to parcel out the responsibility among each other, the security derived from combining in the trust persons of probity, intelligence, and wealth, some selected for one quality, and some for another, would be greatly impaired.

Curtis v. *Mason*.

[In *Curtis* v. *Mason*, 12 Law J., N. S., Ch. 442, a testator gave stock in the funds, three life policies, and the residue of his personal estate, to his wife for her life, and, after her death, his trustees, A. and B., were directed to pay and divide the principal funds equally among his daughters; and he appointed his wife and the trustees his executors. All the executors proved the will, and the trust-funds were invested in stock in the names of A. and B. Mrs. W., one of the daughters, had settled her share on her marriage. Shortly after the widow's death, A. instructed an acquaintance, a stock broker, to sell the stock, which he did as agent for both parties. The money was paid to B., in the presence of A., at the broker's. The trustees then paid the shares of all the legatees, except Mrs. W. Her share was retained by B., who undertook to go to Plymouth to pay the money to one of her trustees, after calling at Bath to obtain her consent to his retaining part of the money in satisfaction of a debt due to him from her husband; promising that, if the difficulties were not settled within a week, the money should be re-invested in the names of A. and B. There were also some difficulties with the trustees of Mrs. W.'s settlement; and after a lapse of seven months, without any steps having been taken by A. to secure the money, B. died insolvent. Sir L. Shadwell, V. C., and Lord Lyndhurst, C., on appeal, held that A. was answerable for the loss. He was clearly answerable at the time of the receipt of the money by B.; and though, if the account had been settled and agreed upon when the money was retained by B. for the purpose of payment to Mrs. W.'s trustees, A. might have been discharged on the principle of *Bacon* v. *Bacon*, the allowing him to retain it when a controversy was anticipated was a clear breach of trust.]

Effect of the ordinary indemnity clauses.

And the ordinary indemnity clauses have scarcely any operation in restricting liability for this kind of negligence. Lord Northington, in one instance, (see *Westley* v. *Clarke*, 1 Eden, 357), certainly ascribed some potency to a clause of indemnity, as exempting executors from responsibility for monies placed by them at the disposal of their co-executor; but the soundness of the decision has been

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questioned, see 2 B. C. C. 117) (*f*), and, undoubtedly, so far as it leans on this circumstance, it is overruled by subsequent adjudications. Thus, where a testator devised real estate to trustees upon

(*f*) [But in *Hovey* v. *Blakeman*, 4 Ves. 608, Lord Alvanley said, that he perfectly concurred in *Westley* v. *Clarke*; and though Lord Eldon, in *Chambers* v. *Minchin*, disapproved of that case, he seems ultimately to have acquiesced, not indeed in the notion that the ordinary indemnity clauses have any peculiar operation, (although where, as in the case of executors, they expressly give an indemnity beyond that of the courts, it is strong doctrine to hold that they are nugatory), but in the general and apparently reasonable rule, that the mere joining in receipts or other unnecessary acts is not of itself sufficient to make an executor answerable for the default of his co-executor: "Executors seem formerly to have been charged on much stricter principles, if they joined unnecessarily, though without taking the control of the money. That rule is now altered. Whether the alteration is wholesome, may be a question. It may be laid down now, as in *Brice* v. *Stokes*, that *though one executor has joined in a receipt, yet whether he is liable shall depend on his acting.* The former was a simple rule, that joining shall be considered as acting; but in the cases since the rule that joining alone does not impose responsibility, scarcely two judges agree." *Walker* v. *Symonds*, 3 Swanst. 64. See *Scurfield* v. *Howes*, 3 B. C. C. 94. In *Joy* v. *Campbell*, 1 Sch. & Lef. 341, Lord Redesdale said, "The distinction seems to be this with respect to a mere signing, that if a receipt be given for the mere purposes of form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in all those cases seems to have been whether the money was under the control of both executors. If it was so considered by the person paying the money, then the giving in the receipt by the executor who did not actually receive it amounted to a direction to pay his co-executor, for it could have no other meaning: he became responsible for the application of the money just as if he had received it. But this does not apply to what is done in the discharge of a necessary duty of the executor; for example, an executor living in London is to pay debts in Suffolk, and remits money to his co-executor to pay these debts. He is considered to do this of necessity; [but see *Moses* v. *Levi*, 3 You. & C. 369, contrà.] It would be the same were one executor in India, and another in England, the assets being in India, but to be applied in England; there the co-executor is appointed for the purpose of carrying on such transaction, and the executor is not responsible, for he must remit to somebody, and he cannot be wrong if he remits to the person in whom the testator reposed confidence." See also *Doyle* v. *Blake*, 2 Sch. & Lef. 242. In *Westley* v. *Clarke*, the money had been paid to the one executor before the other signed the receipt. In *Gregory* v. *Gregory*, 2 You. & C. 313, an estate was devised to three executors in trust to sell, with an option to one of the executors to purchase. The two executors sold and conveyed to the third, and signed a receipt for the purchase-money, which was not paid. On the purchaser's bankruptcy, they were held answerable to the residuary legatee. Alderson, B., held, that the conveyance without payment was a breach of trust, whether the parties were to be considered as trustees or executors, and took notice of the rule as laid down by Lord Redesdale, in *Joy* v. *Campbell*, 1 Sch. & Lef. 341; suggesting, that, if one of the two had received the money, the case would have been different.]

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trust for sale, the proceeds to be invested in Government or real securities, upon certain trusts, with a proviso, that the trustee or trustees for the time being should not be answerable or accountable for any trust-money further than each person for what he or she should respectively actually receive, and not the one for the other or others of them, but each person for his or her own acts, receipts, and defaults only, and not for any loss that might happen by defect in title or value of any fund or security in or upon which any trust-monies should be invested, or by the failure of any banker or bankers with whom any trust-monies should be lodged, nor for any involuntary loss whatsoever. Parts of the estates of the testator were sold by the trustees, one of whom received the purchase-money and retained it in his hands; the co-trustees did not concern themselves about the matter until two years afterwards, when they called on him to invest the money in his hands on security; but being unable so to do, he executed a mortgage of some real estate for securing the repayment, and also a warrant of attorney. The trustee became bankrupt, and the testatrix's estate sustained a loss of nearly 400*l.*, for which it was held that the co-trustees were responsible. *Bone* v. *Cooke*, M'Clel. 168.

So, where, on a marriage, a sum of stock was settled for the separate use of the wife for life, remainder for the husband for life, remainder for their children, with power to change securities with the consent of the wife, and the deed contained a declaration that the trustees should be charged only with such monies as they should actually receive, notwithstanding their joining in any receipt, and that one of them should not be answerable for the others. The dividends on the stock being reduced, one of the trustees, in whom the husband and wife principally confided, and who, with his partners, was their solicitor, informed his co-trustees that he had an opportunity of investing the property in a mortgage at five per cent., and, with the consent of the husband and wife, requested his co-trustees to execute a power of attorney to enable him to sell the stock. The co-trustees, without inquiring into the nature of the proposed security, executed the power. The trustee sold the stock, but, instead of investing the proceeds, retained them in his hands, paying the dividends, or rather a sum equal to them, to the cestuis que trust, who on one occasion applied to him to know if he had procured an eligible mortgage, when the trustee admitted that he had not, but expressed his hope that he should soon be able to do so. The trustee absconded, and the remaining trustees, on a bill filed by the husband and wife, were decreed to replace the stock. *Hanbury* v.

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Kirkland, 3 Sim. 265. [*Broadhurst* v. *Balguy*, 1 You. & C. C. C. 16. See also Lord Eldon's observations on these clauses, in *Dawson* v. *Clarke*, 18 Ves. 254; *Mucklow* v. *Fuller*, Jac. 198; *Williams* v. *Nixon*, 2 Beav. 472; *Moyle* v. *Moyle*, 2 Russ. & M. 710. In *Doyle* v. *Blake*, 2 Sch. & Lef. 239, the distinction suggested by Lord Northington was approved by Lord Redesdale, that, in some cases an executor may be answerable to creditors, who are not bound by the terms of the will, and not to legatees, who are bound.]

Remarks upon indemnity clauses.

The little attention paid to indemnity clauses will appear upon examination to be consistent with the general principle to which the responsibility of trustees in cases of this description has been already referred, namely, as flowing not from the act of joining in the receipt, but from the neglect to ascertain the necessity for raising, or seeing to the application when raised of the fund in question. In this point of view the ordinary clauses are merely expressive of, and do not enlarge the general rule, (*Leigh* v. *Barry*, 3 Atk. 584), though perhaps this construction of them scarcely comports with that principle of interpretation, which always aims at a construction that will render a clause operative, rather than one which makes it nugatory. However this may be, the most cursory glance at the modern cases will shew that indemnity clauses have been estimated so lightly as to make the existence or absence of them a circumstance scarcely sufficient to attract the observation of the reporter—forming a singular contrast to the importance which is attached to such clauses by the unprofessional public. Few persons will undertake trusts when they are omitted, and too many are induced by their misplaced confidence in such provisions to forego those precautions which prudence and honesty dictate as the proper rule of the conduct of men who are dealing with property not their own, of which they have undertaken to be the vigilant and jealous guardians.

Appointment of one trustee by the rest, to act.

[" The appointment by trustees of one of their number to act exclusively in any part of the trust under the authority of all, would, as to the others, have the effect of making the trustees appointing responsible for the acts of the one appointed; that is, they could not treat acts done or monies received by such appointee in the character so conferred on him as the acts or receipts of a co-trustee, for which they as co-trustees would not be liable, but as acts and receipts of their agent, for which they would or would not be liable, as there might be proof of culpable neglect in their dealings with such agent." Per Lord Cottenham, C., *Home* v. *Pringle*, 8 Cl. & Fin. 286.]

Co-trustee not

But though one trustee may in excessive confidence have placed

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liable for funds not wanted, but eventually applied to proper purposes.

at the disposal of a co-trustee funds which were not wanted at the time, there being monies already in his hands applicable to the purpose; yet, if the latter apply the new instead of the old fund, the confiding trustee will be exonerated to the extent of this application. Thus, where three executors, on the representation of the fourth, who was the managing executor, that a fund was wanted for the payment of debts, executed and delivered to him a power of attorney for the sale of stock, it was held, that the executors were chargeable for so much of the fund as he did not apply to the destined purpose, but were not liable for what he did so apply, though he had in his hands another sum of money belonging to the trust estate, which he had acquired without the act of, and therefore without bringing any responsibility upon, the co-trustees. Lord Eldon admitted that no moral blame attached to the executors, but merely that degree of negligence which was frequently observed in very honourable men. It was incumbent on them, however, to have made inquiry as to the application of the fund already in the hands of the executor, before they placed more money at his disposal. *Lord Shipbrooke* v. *Lord Hinchinbrooke*, 11 Ves. 252; 16 Ves. 477. The doctrine of this case of course would only apply where the co-trustee was not responsible for both funds. See also *Underwood* v. *Stevens*, 1 Mer. 712. [*Williams* v. *Nixon*, 2 Beav. 477, where an executor, who had allowed a part of the assets to get into the hands of his co-executor, was held answerable, but was offered an inquiry whether that specific property had been duly administered by the executor. And in *Hewett* v. *Foster*, 7 Jur. 228, where a sum of stock was bequeathed to A. and B. upon certain trusts, and B., who was sole executor, requested A. to sell out the stock, in order that part of the proceeds might be applied in payment of debts, and the residue be lent to B., which was done, Lord Langdale, M. R., held, that A. was answerable for so much only as was not applied in payment of debts, and said that if B. had demanded the whole for payment of debts, that might be a sufficient justification for A. See *S. P.*, *Terrell* v. *Matthews*, 5 Jur. 1074.]

Effect of concurrence of cestui que trust.

Where the act producing the loss has been done at the request, or with the concurrence of a person who has a beneficial interest in the property, and possesses a full knowledge of the circumstances, the trustees are exonerated to the extent of the interest of such party. Thus, where a testator devised to A. and B. freehold and leasehold estates upon trust to sell, and directed the produce to be invested, in trust for his niece E., while unmarried; and, on her marriage, in trust for her absolutely; with power to make a settle-

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ment on her and her issue; and he directed that one trustee should not be answerable for the acts of the others. E. married D., upon which occasion, under the power in question, a settlement was made on E. for life, with remainders to the husband for life, and to their issue. Shortly afterwards, A. and B., with the approbation of D., sold and conveyed a freehold estate, part of the testator's property, to a purchaser, both joining in the receipt for the consideration-money. B. died insolvent, having, it appeared, received the money without investing it. Both the trustees were held to be responsible, except so far as concerned the interest of D., who was bound by the part he had taken in the transaction. *Brice* v. *Stokes*, 11 Ves. 324. [Even infancy or coverture will make no difference where the party has concurred in an actual fraud. 2 Eq. Ab. 489; 3 Swanst. 80, 83; 19 Ves. 640. But it is of course otherwise where there is no fraud at the time of committing the breach of trust. *Kellaway* v. *Johnson*, 5 Beav. 319; *Crosby* v. *Church*, 3 Beav. 485. And where the breach of trust has been committed at the express instance of the cestui que trust of a partial interest, the whole of such interest will be applicable in exoneration of the trustee. "If a trustee were in the management of the trust, with the approbation of the cestui que trust, it must be made good first out of the estate of the person who consented to it. Per Lord Hardwicke, *Trafford* v. *Boehm*, 3 Atk. 440; *Montfort* v. *Cadogan*, 17 Ves. 485; 19 Ves. 635; 2 Mer. 3; *Jacob* v. *Lucas*, 1 Beav. 436; *Booth* v. *Booth*, Id. 125, ante, p. 718, n.; *Lincoln* v. *Wright*, 4 Beav. 432; *Fyler* v. *Fyler*, 3 Beav. 350. And see *Woodyatt* v. *Gresley*, 8 Sim. 180. A stranger who procures a breach of trust to be committed for his benefit is answerable to the cestui que trust. *Fyler* v. *Fyler*, 3 Beav. 550; *Kellaway* v. *Johnson*, 5 Beav. 319. See *Brydges* v. *Bromfil*, 6 Jur. 310.]

Cestui que trust concurring in ignorance, not bound.

If, however, the concurring cestui que trust was at the time ignorant of any circumstances, which, if known, might have materially influenced him in giving or withholding that concurrence, he will not be bound. Thus, where property had been bequeathed to A. and B. in trust to sell, and invest the produce for the benefit of C., D., and E. The trustees were also executors, and the will contained the usual indemnity clause. A. was the acting trustee, B. very reluctantly accepting the trusts at the urgent solicitation of the legatees; he rarely acted, but joined in executing two powers of attorney for the sale of stock, at the joint request of A., his co-trustee, and C., one of the parties beneficially interested, on the representation that the sale was necessary for the purpose of paying legacies.

A. afterwards informed B. that the legacies had been paid, and the residue invested. It afterwards turned out, that a considerable balance was in the hands of A. at the time of the sales, but this fact was not known either to A. *or* D. Sir W. Grant, M. R., held, that, as it appeared that the parties beneficially interested knew nothing of the balance in A.'s hands at the time of the sale, their concurrence in the sale was not material; and that, even if they had known it, their consent that the stock should be sold for the purposes of the will did not imply a consent to the executors applying it to their own benefit; but, as it appeared that part of the stock had been duly applied, his Honor gave them the benefit of this application, notwithstanding the sum previously in their hands, "according to the lenient doctrine of the Lord Chancellor in *Lord Shipbrooke* v. *Lord Hinchinbrooke*." *Underwood* v. *Stevens*, 1 Mer. 712. See also *Ryder* v. *Bickerton*, 3 Swanst. 80, n. [*Cockerell* v. *Cholmeley*, 1 Russ. & M. 425; *M'Carthy* v. *Decaix*, 2 Russ. & M. 615; *Buckeridge* v. *Glasse*, Cr. & Ph. 126, 135; *Wedderburn* v. *Wedderburn*, 4 Myl. & Cr. 41.]

Another instance of the tenderness of the Court in its construction of the acts of persons possessing defective or erroneous information occurred in *Adams* v. *Clifton*, 1 Russ. 298, where stock in the funds having been purchased by the executors and trustees of a will to answer a legacy, the executrix of the surviving executor and trustee executed a power of attorney for the sale of the stock, the proceeds of which were paid to the heir-at-law of the late trustee, under the erroneous impression that he was in that character the personal representative of the trustee. The legatee, for upwards of ten years, received the dividends on her legacy from the heir-at-law, and uniformly treated him as her debtor, on one occasion pressing him for security, and executing a letter of licence to him as one of his creditors, without ever making any application to the executrix. The legatee, however, was not aware that the legacy had ever been invested by the executors in the public funds; and on this ground it was held, that she was not precluded by her dealings with the heir-at-law from making her claim on the executrix, the heir-at-law having become insolvent. [If, by acquiescence after full knowledge, the cestui que trust place the trustee in a worse position than he would have stood in had an earlier call been made, (as by depriving him of the opportunity of enforcing contribution from a co-trustee, &c.), the remedy may be lost. *Gray* v. *Chaplin*, 2 Russ. 126; *Broadhurst* v. *Balguy*, 1 You. & C. C. C. 16; *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 105; *Bennett* v. *Colley*, 2 Myl. & K. 225;

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March v. *Russell*, 3 Myl. & Cr. 31; *Dickenson* v. *Holland*, 2 Beav. 310; *Blackwood* v. *Burrowes*, 2 Con. & L. 459; *Mehrtens* v. *Andrews*, 3 Beav. 72.]

Trustees allowed no compensation for trouble.

3. *Allowance for Trouble and Expenditure.*]—The office of a trustee is honorary; and he is not allowed any compensation for his personal diligence and trouble in the trust, however onerous its duties may have been. *Godfrey* v. *White*, Finch, 362; *Robinson* v. *Pett*, 3 P. W. 251; *Brocksopp* v. *Barnes*, 5 Madd. 90 (*g*). And so far was this principle carried at an early period, that an agreement for compensation to a trustee was considered to be one which equity would not enforce or recognise. *Gould* v. *Fleetwood*, 3 P. Wms. 252, n., [where, however, the actual decision was founded on the circumstance that the executor, having agreed to act for 100 guineas, died before he had completed the administration.] But this inconvenient doctrine was considerably relaxed so long ago as the time of Lord Hardwicke, who thought the contract might be sustained, if a trustee comes in a fair and open manner, and tells the cestui que trust that he will not act in such a troublesome and burdensome office, unless the cestui que trust will give him a further compensation, over and above the terms of the trust, and it is contracted for between them. See *Ayliffe* v. *Murray*, 2 Atk. 60; *Court* v. *Robarts*, 6 Cl. & Fin. 65.

Contracts for compensation valid.

At the present day, it is clear that such an agreement would be valid. [See *Moore* v. *Frowd*, infra, p. 732.] Indeed, in *Marshall* v. *Holloway*, 2 Swanst. 453, it was referred to the Master to settle an allowance to be made to a trustee, as well for his future labour in the trust, as for the past time that he had been engaged therein, it being represented by the co-trustees, that the circumstances of the estate required the application of a great portion of time; and

(*g*) [Thus, in *Webb* v. *Shaftesbury*, 7 Ves. 488, Lord Eldon held, that a trustee could not derive any advantage or pleasure even from the game on the estate: "There must be an inquiry whether the liberty of sporting can be let for the benefit of the cestuis que trust; if not, I think the game will belong to the heir. If it is necessary for the preservation of the game, that he should appoint a gamekeeper, I would not prevent him from appointing one, but for that purpose only; for he cannot, under this will, have an establishment of pleasure there." See 3 You. & C. 564. See further, as to the exclusion of trustees from any benefit from their office, ante, Vol. 5, pp. 402, 413, 455; Vol. 2, pp. 69, 72. But a surviving partner, employing the money of the deceased partner in trade, will be allowed a fair remuneration for his management. *Brown* v. *De Tastet*, Jac. 284; unless he has agreed by the articles to carry on the business; ante, Vol. 7, pp. 84, 117, 176; *Willett* v. *Blanford*, 1 Hare, 253; *Brocksopp* v. *Barnes*, 5 Madd. 90.]

that they could not undertake the trust without the aid of the person in question, who had had the confidential management of the testator's affairs in his lifetime; and that he had accepted the trust under the assurance that such an allowance would be applied for. But the general rule of the Court is, not to make a retrospective allowance; and the answer given to a trustee claiming it on the footing of extraordinary services is, that he should have made out a special case to the Court, before he accepted the trust. *Brocksopp* v. *Barnes*, 5 Madd. 90. [Where the testator devised an estate to A. and his heirs, upon trust to set and manage, and out of the rents and profits to pay all expenses, and retain a commission of 5*l.* per cent. on the gross rental for his trouble, it was of course held, that the trustee was entitled to all his expenses, in addition to the commission. *Webb* v. *Shaftesbury*, 7 Ves. 480; *Wilkinson* v. *Wilkinson*, 2 Sim. & St. 237; and such a commission, or an annuity given to a trustee or executor, does not cease upon the institution of a suit for administering the estate, for the duty of the trustee or executor continues; *Baker* v. *Martin*, 8 Sim. 25. See *Underwood* v. *Hatton*, 5 Beav. 36. A direction, that executors shall be paid for their trouble as well as expenses, entitles them to an inquiry before the Master as to what is reasonable; *Ellison* v. *Airey*, 1 Ves. sen. 115.]

Webb v. *Shaftesbury.*

So a solicitor, who fills the office of trustee, is unable to charge for business transacted for the trust estate. This doctrine was very distinctly laid down in a case in the Exchequer, of the judgment in which the Editor has been favoured by Mr. Younge with the following note:—Lord Lyndhurst, C. B., said, that the sole question to be decided was, as to whether a solicitor, who was an executor or trustee, was entitled to be paid his bill of costs for business done by him as an attorney, he being also an executor. There was no point more clearly established as a general question by the case referred to of *Robinson* v. *Pett*, 3 P. W. 251, and other decisions, than that an executor or trustee was not entitled to be paid for his trouble. If the accounts were complicated, and the executor or trustee took upon himself to settle and manage those accounts, although it might take a great deal of his time and attention, the principle of equity was, that he was not entitled to compensation for his time and trouble. If he chose to employ an accountant to settle the accounts, for the expenses so occasioned, he was entitled to be remunerated out of the estate. The principle was this: it was the duty of an executor or trustee to be the guardian of the estate committed to his charge. If he were allowed to perform the duties of the estate, and

Solicitor, who is trustee, not entitled to charge for business transacted for the trust estate.

MS. case of *New* v. *Jones.*

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to claim compensation for his services, his interest would be opposed to his duty, and, as a matter of prudence, this Court could not allow an executor or a trustee to place himself in such a situation. If he chose to perform those duties, he was not entitled to compensation. His Lordship was of opinion, that the principle applied as strongly to the case of an attorney as to that of any other person. If an attorney, who is an executor, performs business that was necessary to be transacted—if this attorney, being an executor, performs those duties himself—his Lordship was of opinion, that he (the attorney) was not entitled to be repaid for those duties; it would be placing his interest at variance with the duties he had to discharge. It was said that the bill might be taxed, and that this would be a sufficient check. He was of opinion, that it would not be a sufficient check. The estate had a right not only to the protection of the taxing officer, but also to the vigilance and guardianship of the executor or trustee, in addition to the check of the taxing officer. There might be cases (he did not speak with reference to the present case) where a trustee, placed in the situation of a solicitor, might, if he were allowed to perform the duties of a solicitor, and to be paid for them, find it very often proper to institute and carry on legal proceedings, which he would not do if he were to derive no emolument from them himself, and if he were to employ another person. In point of prudence and propriety, and as a guard over the estate, he was of opinion that it would not be proper that a solicitor, who was a trustee, should be distinguished from an ordinary trustee. *If a trustee, who was a solicitor, acted as a solicitor, he was not entitled to charge for his labour, but merely for his costs out of pocket.* This rule applied to the present case. *New* v. *Jones*, Exch., 9th Aug. 1833. [See *Carmichael* v. *Willson*, 2 Moll. 350, where the trustee of a married woman's separate estate acted as her solicitor in a suit brought against her by a creditor seeking payment out of her separate estate, to which the trustee was not a party, and also in two other suits relating to the property, to which he was a party: he was held entitled to make the usual professional charges in the first suit, but not in the others. *Fraser* v. *Palmer*, 4 You. & C. 515.]

Moore v. *Frowd.*

"All costs, charges, and expenses, which the trustees might sustain, expend, or be put unto, to be paid as between solicitor and client."

[In *Moore* v. *Frowd*, 3 Myl. & Cr. 45, the plaintiff, Charlotte Moore, conveyed lands to four solicitors, upon trust to sell in building-lots, and out of the proceeds to pay the costs of preparing the deed, and all expenses, disbursements, and charges already or thereafter to be *incurred, sustained, or borne* by the trustees or trustee for the time being, either in professional business, journies, or otherwise, in the execution of the trusts, and also the charges of all sur-

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veyors, auctioneers, &c., employed by the trustees, &c.; and it was declared that the trustees should, out of the trust-monies, deduct and retain all such reasonable costs, charges, and expenses, as they, or any of them, might *sustain, expend, or be put unto,* in or about the execution of the trusts, such costs, charges, and expenses to be reckoned, stated, and paid, as between attorney and client. Lord Cottenham, C., by consent, gave judgment in the cause, which had been argued before him when Master of the Rolls; and, expressing his entire concurrence in the judgment of Lord Lyndhurst in *New* v. *Jones,* held, that the deed contained no agreement varying the ordinary rule, and that, therefore, the Master, in taking the accounts of the trustees, was not to allow them any professional charges, or charges for loss of time or other emoluments, but only charges and expenses actually and properly paid out of pocket. His Lordship said: "Parties may, by contract, make a rule for themselves, and agree that a trustee, being a solicitor, shall have some benefit beyond that which, without such contract, the law would have allowed; but in such a case the agreement must be distinct, and in its terms explain to the client the effect of the arrangement, and the more particularly when the solicitor for the client, being himself a trustee, has an interest personal to himself adverse to that of the client. *It is not easy in such a case to conceive how, consistently with the established rules respecting contracts between solicitors and their clients, a solicitor could maintain such a contract made with his client for his own benefit, the client having no other professional adviser, and in the absence of all evidence, and of any probability of the client* (*a woman, too*) *having been aware of her rights, or of the rule of law, or of the effect of the contract.* But the necessity for following up these considerations does not arise in this case, unless the deed contains a distinct agreement for this purpose. * * * * The second provision does no more than the rule of law would have done, a trustee's costs being taxed as between attorney and client. And what are the costs so to be taxed? Costs which the trustees may sustain or be put unto; terms wholly inapplicable to sums claimed as remuneration. There is nothing in either of these provisions which is peculiarly applicable to the case of the solicitor being also trustee. * * * * It is clear, that, if an attorney be allowed to make profit by means of professional business of his office of trustee, it will constitute an exception to a rule well known and established in all other cases. *Robinson* v. *Pett,* 3 P. Wms. 249. A factor acting as executor is not so entitled; *Scattergood* v. *Harrison,* Mosel. 128; nor a commission-agent; *Sheriff* v. *Axe,* 4 Russ. 33.

Professional charges by trustee, who is a solicitor.

As to contracts between solicitor and client, for allowance of remuneration for business transacted as trustee.

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Professional charges by trustees.

Why is the case of a solicitor to constitute an exception to the rule? What is the reason given for the rule? It is, I think, well stated in *Robinson* v. *Pett*. 'The reason seems to be, for that on these pretences, if allowed, the trust estate might be loaded, and rendered of little value.' It is not because the trust estate is in any particular case charged with more than it might otherwise have to bear, but that the principle, if allowed, would lead to such consequences in general."]

Provision that solicitor-trustee should be allowed professional charges.

[Where there was an unequivocal provision that the trustee should be entitled to make professional charges, and no allegation that it was obtained by fraud or improper means, effect was given to it. *In re Sherwood*, 3 Beav. 338. Again, where the testator, a victualler, authorized his executors and trustees to carry on his trade for the benefit of his family, with full powers for that purpose; and one of them was a brewer, and the other a spirit merchant, and they had been accustomed to serve the testator in his lifetime, Lord Langdale, M. R., held, that they were entitled to charge for proper supplies after the testator's death at the ordinary market price, and not at cost price. *Smith* v. *Langford*, 2 Beav. 362.]

Supplies by trustee who is a trader.

Charges by firm, in which trustee is a partner.

[If the trustee or executor is a solicitor in partnership, the firm is entitled to no more than the costs out of pocket. *Collins* v. *Carey*, 2 Beav. 128. So, an executor, who is a partner in a bank, cannot be allowed charges for commission paid to such bank. *Heighington* v. *Grant*, Rolls, 9 Law J., N. S., 142. But an executor, who, being a country solicitor, conducts a cause through his town agent, will be allowed that proportion of costs, properly incurred, which he has paid to his town agent, although, if the reasoning on which the general rule is founded were carried to its extreme length, it would exclude such allowance; *Burge* v. *Brutton*, 2 Hare, 373. An executor's claim for costs bonâ fide paid to a solicitor is liable to revision, though not to strict taxation, in the Master's Office. *Johnson* v. *Telford*, 3 Russ. 477.]

[In *Willis* v. *Kebble*, 1 Beav. 559, a testator authorized his trustees to retain "all costs, charges, and expenses, fees to counsel, and for advice, and for professional assistance and loss of time, paid, incurred, sustained, or occasioned in or about the execution of the said trusts;" and one of the trustees, being a land-agent, was held entitled to an allowance for loss of time.]

Interest on money advanced by trustee.

[An executor may be allowed interest on money borrowed or advanced by him out of his own pocket to satisfy urgent demands. *Small* v. *Wing*, 5 B. P. C. 72. See *Gordon* v. *Traill*, 8 Price, 416.]

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Indian commission.

[As to allowances, by way of commission, (usually at the rate of 5*l.* per cent.), to executors in India, who, according to the practice of the courts there, are considered as factors, see *Chetham* v. *Lord Audley*, 4 Ves. 72; *Hovey* v. *Blakeman*, Id. 596; *Freeman* v. *Fairlie*, 3 Mer. 24; *Wilkinson* v. *Wilkinson*, 2 Sim. & St. 237; *Cockerell* v. *Barber*, 1 Sim. 23; 2 Russ. 585; *Sheriff* v. *Axe*, 4 Russ. 33; *Campbell* v. *Campbell*, 6 Jur. 635; *Cockburn* v. *Raphael*, 2 Sim. & St. 453. A legacy for trouble, accepted by the executor, bars his claim to commission. See *Freeman* v. *Fairlie*; *Cockerell* v. *Barber*. So, in the West Indies, allowances, varying from 5*l.* per cent. upwards, may be claimed by trustees and executors, but not by mortgagees, for sums actually received there by them. *Chambers* v. *Goldwin*, 5 Ves. 834; 9 Ves. 254; *Denton* v. *Davy*, 1 E. F. Moo. Pr. C. C. 15.]

Allowance to trustees for salaries to agents, &c.

But a trustee is at liberty to employ proper assistants, at the expense of the estate; and the salary of a bailiff or accomptant, or any other agent whose services are fairly required, would be allowed him, under the title of "just and reasonable allowances," which, in taking the accounts of trustees, the Master is always directed to make to them. *Henderson* v. *M'Iver*, 3 Madd. 275; *Stuart* v. *Hoare*, 2 B. C. C. 663; *Cockburn* v. *Raphael*, 2 Sim. & St. 453; *Forrest* v. *Elwes*, 2 Mer. 68. [Ante, Vol. 2, p. 73. Where an executor paid an agent 5*l.* per cent. for collecting the debts of the testator, who was a tailor, and the Master disallowed a moiety, Sir J. Leach, M. R., doubting whether any allowance ought to have been made, overruled an exception to the Master's disallowance, and said, that, except under very special circumstances, executors are not allowed to employ an agent to perform those duties which, by accepting the office, they have taken upon themselves. It was a question for the Master. *Weiss* v. *Dill*, 3 Myl. & K. 26. In *Hopkinson* v. *Roe*, 1 Beav. 180, the Master had also allowed 2*l.* 10*s.* per cent. commission paid by an executor to an agent for collecting the debts, the testator being a tailor, and the allowance was supported upon cross exceptions. As to the rate of allowance, see *Day* v. *Croft*, 2 Beav. 488; ante, Vol. 2, p. 71.] But, if the trustee chooses to perform the duty himself, he cannot, unless by special contract, as already mentioned, claim any allowance. See *Bonithon* v. *Hockmore*, 1 Vern. 316. [The Court will not, except under special circumstances, appoint the trustee to be receiver, with or even without an allowance, especially, in the former case, if there is also a power to let, exposing the trustee to the temptation of immediate increase of emolument by an immediate increase of rent. The cestuis que trust, if they pay a receiver, are entitled to have the super-

Trustee will not be appointed receiver.

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intendence of the trustee as a check. *Sutton* v. *Jones*, 15 Ves. 588; *Sykes* v. *Hastings*, 11 Ves. 363; *Home* v. *Pringle*, 8 Cl. & Fin. 287. However, it is competent for the Court to appoint an executor and trustee, or consignee, with the usual profits. *Morison* v. *Morison*, 4 Myl. & Cr. 215. Vide ante, Vol. 2, p. 69; as to mortgagees, ante, Vol. 5, p. 398.] A bill of costs paid to a solicitor for necessary law charges is, of course, allowed to an executor or trustee; *Macnamara* v. *Jones*, Dick. 587; and generally all reasonable expenses incurred by him in the execution of his trust. *Hethersell* v. *Hales*, 2 Ch. Rep. 581. In *Wilkinson* v. *Wilkinson*, 2 Sim. & St. 237, trustees were allowed the salary paid to a collector of rents, although a yearly sum of five guineas apiece was bequeathed to them for their trouble, as the property consisted of fifty houses, of which thirty-four were let at weekly rents. [As to allowances for other expenses, as for travelling, &c., see *Att.-Gen.* v. *Mayor of Norwich*, 2 Myl. & Cr. 406; Id. 523: *Malcolm* v. *O'Callaghan*, 3 Id. 52. It may be here observed, that the costs of getting in property specifically bequeathed are to be paid out of the general estate as part of the expenses of the administration. *Perry* v. *Meddowcroft*, 4 Beav. 204.]

As to suits by executors and trustees to obtain the direction of the Court.

The present section should not be concluded without a remark as to the right of executors and trustees to institute suits, in order to obtain the direction of the Court in regard to points of difficulty occurring in the execution of their trust. ["A trustee has a right to the protection of the court in the execution of his trust; there are exceptions where the act required to be done leads to no responsibility, and the motive of the trustee is obviously vexatious. If this trustee would have been entitled to the assistance of the Court as a defendant, I cannot deny him that assistance, because he asks it as plaintiff." Per Sir J. Leach, V. C., *Curteis* v. *Candler*, 6 Madd. 123. See *Goodson* v. *Ellisson*, 3 Russ. 583; *Taylor* v. *Glanville*, 3 Madd. 176; *Talbot* v. *Radnor*, 3 Myl. & K. 253; *Henley* v. *Phillips*, 2 Atk. 48; *Tebbs* v. *Carpenter*, 1 Madd. 308; *Woodhead* v. *Marriott*, C. P. Coop. 62; *Attorney-General* v. *Drummond*, 3 Dru. & W. 162; *Thomason* v. *More*, 5 Beav. 27.] The rule of equity certainly allows greater latitude than will, in general, be used by a conscientious trustee, whose inquiry will be, not whether he is legally justified in the institution of a suit, and is secure from the risk of being rendered liable to costs on his taking such a step, but whether his protection imperatively calls for a measure which must inflict injury upon the persons beneficially interested. But though the Court will go far (as it ought) in justifying trustees, who are driven by the conflicting claims of parties to seek its direction, it will not sanction the conduct

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of a trustee, who, under the pretence of self-protection, involves the trust-property in a suit, for the purpose of raising a question on which no rational doubt could be entertained; still, however, it will not punish with equal and undistinguishing severity the blunders of ignorance and the more culpable, though often not more mischievous, machinations of fraud. Thus, where trustees refused to pay to the assignee of a bankrupt legatee a legacy which was reversionary at the time of the bankruptcy, but had since fallen into possession, on the ground that the bankrupt had set up a claim to it; Sir J. Leach, M.R., refused to give the defendants their costs; but, as their refusal appeared to arise from ignorance, and not from any improper motive, his Honor did not order them to pay the plaintiff's costs. *Knight* v. *Martin*, 1 Russ. & M. 70. [S. P. *Angier* v. *Stannard*, 3 Myl. & K. 566; *Campbell* v. *Horne*, 1 You. & C. 664. See *Raphael* v. *Boehm*, 13 Ves. 592; *Portlock* v. *Gardner*, 1 Hare, 594; *Thorby* v. *Yeats*, 1 You. & C. C. C. 438; *Whitmarsh* v. *Robertson*, Id. 715; *Aldridge* v. *Westbrook*, 4 Beav. 212; *Holford* v. *Phipps*, Id. 475; *Fyler* v. *Fyler*, 3 Beav. 550; 2 Railw. Cas. 876: *Willett* v. *Jones*, 6 Jur. 923; *Froste* v. *Hamilton*, Id. 525.] See farther, on this subject, Beames on Costs; Hovenden on Frauds; Madd. Ch. Pract.; Lewin on Trusts.

LEGACY DUTY.

4. *Retention and Payment of Legacy Duty.*]—The legacy duty was first imposed by stat. 20 Geo. 3, c. 28, and was increased and subjected to various regulations by several succeeding acts. (23 Geo. 3, c. 58; 29 Geo. 3, c. 51; 36 Geo. 3, c. 52; 44 Geo. 3, c. 98; 45 Geo. 3, c. 28; 48 Geo. 3, c. 149). The present rate of duty was fixed by the stat. 55 Geo. 3, c. 184, the third part of the schedule to which contains the following clause:—

Stat. 55 Geo. 3, ch. 184; sched. pt. 3.

LEGACIES and SUCCESSIONS to Personal or Moveable Estate, upon Intestacy.

Legacies.

I. *Where the testator, testatrix, or intestate, died before or upon the 5th day of April*, 1805 (*h*)—

Amount of duty where testator died before or on 5th of April, 1805.

For every legacy, specific or pecuniary, or of any other description

(*h*) ["It is remarkable, that the act which first imposed a duty upon legacies themselves as contra-distinguished from the duty upon the mere receipts, namely, the 36 Geo. 3, c. 52, is an act confined to that subject, and with a title importing the subject of it; and that the act which first charged duties upon legacies payable out of land, namely, the 45 Geo. 3, c. 28, in like manner is confined to the subject, and has a title to attract attention to it; in both of which acts there are express clauses to confine their operation to wills subsequently made, whereas the retrospective enactments are to be found only in the schedules to general stamp acts." Per Lord Abinger, C.B., *Attorney-General* v. *Hancock*, 2 Meeson & Welsby, 597.]

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Stat. 55 Geo. 3, c. 184; sched. pt. 3.

of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who died before or upon the 5th day of April, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of August, 1815.

Also, for the clear residue, (when devolving to one person) and for every share of the clear residue, (when devolving to two or more persons), of the personal or moveable estate of any person who died before or upon the 5th day of April, 1805, (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of August, 1815.

Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the deceased, or any descendant of a brother or sister of the deceased*, a duty at and after the rate of 2*l.* 10*s.* per centum, on the amount or value thereof.

Where any such legacy, &c. shall have been given, or have devolved, to or for the benefit of *a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased*, a duty at and after the rate of 4*l.* per centum, on the amount or value thereof.

Where any such legacy, &c. shall have been given, or have devolved, to or for the benefit *of a brother or sister of a grandfather or grandmother of the deceased or any descendant of a brother or sister of a grandfather or grandmother of the deceased*, a duty at and after the rate of 5*l.* per centum, on the amount or value thereof.

And where any such legacy, &c. shall have been given, or have devolved, to or for the benefit of any person, *in any other degree of collateral consanguinity to the deceased* than is above described, or to or for the benefit of any stranger in blood to the deceased, a duty at and after the rate of 8*l.* per centum, on the amount or value thereof.

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Stat. 55 Geo. 3, c. 184 ; sched. pt. 8.

II. *Where the testator, testatrix, or intestate, shall have died after the 5th day of April,* 1805—

Amount of duty where testator died after 5th of April, 1805.

For every *legacy* (*i*), specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th day of April, 1805, *either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof* (*i*), and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of August, 1815.

Legacy of £20 or upwards out of personal or real estate.

Residue to value of £20 or upwards, under will or intestacy.

Also, for the clear residue, (when devolving to one person), and for every share of the clear residue, (when devolving to two or more persons), of the personal or moveable estate of any person who shall have died, after the 5th day of April, 1805, (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815.

Residue of money directed by will to be raised out of real estate.

And also, for the clear residue, (when given to one person), and for every share of the clear residue, (when given to two or more persons), of the monies to arise from the sale, mortgage, or other disposition of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed of, by any will or testamentary instrument, of any person who shall have died after the 5th day of April, 1805, (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any), where such residue, or share

(*i*) [The word legacy in this act is to be interpreted by the definitions contained in the prior acts of 36 Geo. 3, c. 52, and 45 Geo. 3, c. 28, stated infra, pp. 742, 760. It therefore includes donations mortis causâ, and appointments of personal estate under a general power. *Re Cholmondeley*, 1 Cr. & M. 149; and it is immaterial that the power is contained in a will, and relates to personal estate, so as to be subject to legacy duty also under that will. And a power to appoint by will only "to any person or persons, except A. and his relations, B. and his relations, and the relations of C., deceased," has been held to be a general power to dispose of the property as the donee shall think fit, (and also a general and absolute power within the 36 Geo. 3, c. 52, s. 18), so as to make any interest appointed by will liable to the claims of creditors, and to legacy duty. *Platt* v. *Routh*, 6 Mee. & W. 756; 3 Beav. 257.]

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of residue, shall amount to 20*l.* or upwards, and where the same shall be paid, retained, or discharged, after the 31st day of August, 1815.

Child or ancestor, or issue of child.

Where any such legacy, &c. shall have been given, or have devolved, to or for the benefit of *a child of the deceased, or any descendant of a child of the deceased,* or to or for the benefit of *the father or mother, or any lineal ancestor of the deceased,* a duty at and after the rate of 1*l.* per centum on the amount or value thereof.

Brother or sister, or issue of brother or sister.

Where any such legacy, &c. shall have been given, or have devolved to or for the benefit of *a brother or sister of the deceased, or any descendant of a brother or sister of the deceased,* a duty at and after the rate of 3*l.* per centum on the amount or value thereof.

Uncle or aunt, or issue of uncle or aunt.

Where any such legacy, &c. shall have been given, or have devolved, to or for the benefit of *a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased,* a duty at and after the rate of 5*l.* per centum on the amount or value thereof.

Grand uncle or grand aunt, or issue.

Where any such legacy, &c. shall have been given, or have devolved, to or for the benefit of *a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased,* a duty at and after the rate of 6*l.* per centum on the amount or value thereof.

Other collateral relation or stranger.

And where any such legacy, &c. shall have been given, or have devolved, to or for the benefit of any person, *in any other degree of collateral consanguinity to the deceased* than is above described, or to or for the benefit of *any stranger in blood to the deceased,* a duty at and after the rate of 10*l.* per centum on the amount or value thereof.

Annuities.

And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest, out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of this schedule.

Several legacies, each under £20, to same person.

And where any legatee shall take two or more distinct legacies or benefits, under any will or testamentary instrument, which shall together be of the amount or value of 20*l.*, each shall be charged with duty, though each or either may be separately under that amount or value.

Exemptions.

Exemptions.

Gifts to husband or wife, or royal family.

Legacies and residues, or shares of residue, of any such estate or effects as aforesaid, given or devolving to or for the benefit of the

husband or wife of the deceased, or to or for the benefit of any of the royal family.

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39Geo. 3, c. 73.

And all legacies which were exempted from duty by the act passed in the 39th year of his Majesty's reign, c. 73, for exempting certain specific legacies given to bodies corporate, or other public bodies, from the payment of duty. [The act of 39 Geo. 3, c. 73, here referred to, exempts books, prints, pictures, gems, coins, medals, and other specific articles bequeathed in order to be preserved.]

Pictures, medals, &c., to public bodies.

The regulations now in force are principally contained in stat. 36 Geo. 3, c. 52, of which the following is an abstract:—

Stat. 36 Geo. 3, c. 52, [26 April, 1798.]

Sect. 6 enacts, "That the duties hereby imposed shall, in all cases in which it is not hereby otherwise provided, be accounted for, answered, and paid, by the person or persons having or taking the burthen of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever, of any legacy, &c., to which any other person or persons shall be entitled; and in case any person or persons having or taking the burthen of such execution or administration as aforesaid, shall retain for his, her, or their own benefit, or for the benefit of any other person or persons, any legacy &c., which such person or persons shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons, and upon which any duty shall be chargeable by virtue of this act, not having first paid such duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy, or any part thereof, to which any other person or persons shall be entitled, and upon which any duty shall be chargeable by virtue of this act, having received or deducted the duty so chargeable, then and in every of such cases, the duty which shall be due and payable upon every such legacy, &c., and which shall not have been duly paid and satisfied to his Majesty, his heirs and successors, according to the provisions of this act, shall be a debt of such person or persons having or taking the burthen of such execution or administration as aforesaid, to his Majesty, his heirs and successors; and in case any such person or persons so having or taking the burthen of such execution or administration as aforesaid, shall de-

Duties to be paid by executors or administrators, on retaining or paying legacies.

If duty be not paid before legacies are retained by executors, or discharged, they having deducted it, the amount to be a debt from them to his Majesty; and if they pay legacies without deducting the duty, it shall be a debt from both parties.

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liver, pay, or otherwise howsoever satisfy or discharge any such legacy, &c., to or for the benefit of any person or persons entitled thereto, without having received or deducted the duty chargeable thereon, (such duty not having been first duly paid to his Majesty, his heirs or successors, according to the provisions herein contained), then and in every such case such duty shall be a debt to his Majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge, and of the person or persons to whom the same shall be made." [*Re Sammon*, 3 Mee. & W. 381; *Foster* v. *Ley*, 2 Scott, 438; *Att.-Gen.* v. *Hughes*, 11 Law J., N. S., Ch. 329.]

What shall be deemed legacies within this act.

Sect. 7. "That any gift by any will or testamentary instrument of any person dying after the passing of this act, which shall by virtue of such will &c. have effect, or be satisfied out of the personal estate of such person so dying, or out of *any personal estate which such person shall have power to dispose of as he or she shall think fit*, shall be deemed and taken to be a legacy within the intent of this act, whether the same shall be given by way of annuity, or in any other form, and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix who shall give the same, except so far as the same shall be paid or satisfied out of such real estate in a due execution of the will &c. by which the same shall be given, and every gift which shall take effect as a donation mortis causâ shall also be deemed a legacy within the intent and meaning of this act." [This section is extended by stat. 45 Geo. 3, c. 28, post, p. 760. The reference in the earlier act to real estate appears to have been made in contemplation of a bill for charging real estate, which was not passed. Gwynne, p. 73, 2nd Ed. The definitions of a legacy contained in the stats. 36 Geo. 3, c. 52, and 45 Geo. 3, c. 28, have been held to govern the construction of the stat. 55 Geo. 3, c. 184. *Re Cholmondeley*, 1 Cr. & Mee. 149; *Platt* v. *Routh*, 6 Mee. & W. 756; 3 Beav. 557.]

Donatio mortis causâ.

The value of annuities, and the duty, to be calculated according to the annexed tables, and the duty paid by instalments, &c.

Sect. 8. "That the value of any legacy given by way of *annuity*, whether payable annually or otherwise, for any *life* or *lives*, or for *years determinable on any life or lives*, or *for years or other period of time* (*k*), shall be calculated, and the duty chargeable thereon shall be charged, according to the tables in the schedule hereunto

Rent-charge in fee.

(*k*) [It is the general opinion that these words do not extend to a perpetual annuity, and that a rent-charge in fee-simple is therefore not chargeable with duty, although a rent-charge for life or years is a legacy within the present stamp act as explained by this section. But this is not quite clear.]

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annexed; and the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the payment of the first year's annuity, and the three others of such payments of duty shall be made in like manner successively, before or on completing the respective payments of the three succeeding years' annuity respectively; and the value of any such annuity, if determinable upon any contingency besides the death of any person or person, shall be calculated without regard to such contingency: Provided always, that if any such annuity shall determine by the death of any person, before four years' payment of such annuity shall become due and payable, then and in such case the duty shall be payable in proportion only to so many of the payments of the said annuity as actually accrued and became due and payable; and in case any such annuity shall at any time determine upon any other contingency than the death of any person or persons, then and in such case, not only all payments of duty which would otherwise become due after the happening of such contingency, if any such would become due, shall cease; but it shall be lawful for the person or persons who shall have paid any duties which shall have previously become due, to apply for and obtain a return of so much of the duty so paid, as will reduce the same to the like duty as would have been payable by such person or persons for such annuity, calculated according to the term for which the same shall have endured; which abatement the said commissioners for management of the stamp duties shall settle and determine according to the tables in the schedule hereunto annexed, and shall cause the amount of such abatement to be paid to the person or persons entitled to the same, out of any monies in their hands arising from the duties imposed by this act."

The value of annuities payable out of legacies, and the duty, to be calculated according to the annexed tables, and the duty to be charged on the value of such legacies after deducting such annuities, &c.

Sect. 9. "That the value of any legacy given by way of annuity for any life or lives, or for years determinable on any life or lives, or for years or other period of time, and charged on and made payable out of any other legacy or legacies, shall be calculated, and the duty shall be charged thereon, in the same manner as hereinbefore directed with respect to other annuities; and the duty on the legacy charged with such annuity, if any duty shall be payable for such legacy, shall be calculated on the value of such legacy, after deducting the value of such annuity; and the duty for such annuity shall be paid by the person or persons entitled to the legacy or legacies charged with such annuity, by four equal payments, in the same manner as the same would be payable according to the provisions hereinbefore contained, if such annuity had been a direct gift to the

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annuitant, and subject to the like proviso in case such annuity shall determine before four years' payment shall become due: and the payment which shall be made for such duty, shall be retained by the person or persons paying the same, out of the first four years' payments of such annuity, if so many shall become due, or out of so many of such payments as shall become due, by equal portions."

Duty on legacies given to purchase annuities, to be calculated on the sums necessary to purchase them.

Sect. 10. "That the duty payable upon any legacy given by direction to purchase with any personal estate of the testator or testatrix, or any part thereof, an annuity of a certain amount for the life or lives of any person or persons, or any other term, shall be calculated upon the sum necessary to purchase such annuity according to the tables before mentioned, and shall be deducted from such sum, and paid as in the case of other pecuniary legacies; and the person or persons paying or satisfying such legacy, and the person or persons for whose benefit the same shall be paid or satisfied, shall be discharged, by payment of such duty so calculated as aforesaid, from all other demands in respect of the duty payable on such legacy; and the annuity to be purchased for the benefit of the person or persons entitled to the benefit of such legacy, shall be reduced in proportion to the amount of the duty payable thereon as aforesaid, such reduction to be calculated in the same manner as the duty so payable is hereinbefore directed to be calculated; and the purchase of such reduced annuity, together with the payment of such duty, shall satisfy and discharge such legacy as fully as if an annuity had been purchased equal in amount to the annuity so directed to be purchased."

Duty on legacies, whose value can only be ascertained by application of the allotted fund, to be charged on the money as applied.

Sect. 11. "That if any benefit shall be given by any will or testamentary instrument, in such terms that the amount or value of such benefit can only be ascertained, from time to time, by the actual application for that purpose of the fund allotted for such purpose, or made chargeable therewith; or if the amount or value of any benefit given by any will or testamentary instrument cannot, by reason of the form and manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained; then and in every such case, such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such will or testamentary instrument, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes, or charged with answering the same." [See *Re Wilkinson*, 1 Cr. M. & R. 142.]

How duty on

Sect. 12. "That the duty payable on a legacy, &c. given to or

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legacies enjoyed by persons in succession, or having partial interests therein, shall be charged.

for the benefit of, or so that the same shall be enjoyed by, different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy &c. so given, as in the case of a legacy to one person; and where any legacy &c. shall be given to or for the benefit of, or so that the same shall be enjoyed by, different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon, all persons who, under or in consequence of any such bequest, shall be entitled for life only, or any other temporary interest, shall be chargeable with the duty in respect of such bequest, in the same manner as if the annual produce thereof had been given by way of annuity; and such persons respectively shall be so chargeable with such duty, and the same shall be payable when they shall respectively become entitled to and begin to receive such produce, and shall be paid by equal portions during the aforesaid term of four years, if they shall so long continue to receive such produce; and where any other partial interest shall be given, or shall arise out of such property so to be enjoyed in succession, the duty on such partial interest shall be charged and paid in the same manner as the duty is hereinbefore directed to be charged and paid in like cases of partial interests, charged on any property given, otherwise than to different persons in succession; and all and every person and persons who shall become absolutely entitled to any such legacy &c., so to be enjoyed, in succession, shall when and as such person or persons respectively shall receive the same, or begin to enjoy the benefit thereof, be chargeable with and pay the duty for the same, or such part thereof as shall be so received, or of which the benefit shall be so enjoyed, in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed, or in such manner that the same shall be enjoyed in succession."

—and by whom payable.

Sect. 13. "That the duty payable on any legacy, &c. so given to, or so to be enjoyed by, different persons in succession, upon whom the duty shall be chargeable at one and the same rate, shall be deducted and paid by the person or persons having or taking the burthen of the execution of the will or testamentary instrument under which the title thereto shall arise, upon payment or other satisfaction or discharge of every or any part of such legacy, &c. to any trustee or trustees, or other person or persons to whom the same shall be payable or paid in trust or for the benefit of the

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persons so entitled thereto in succession; and if the same shall not be so paid or satisfied to any such trustee or trustees, then such duty shall be deducted and paid out of the capital of the property so given, upon receipt, by any of the persons so entitled in succession, of any produce of such capital, or any part thereof, according to the amount of the capital of which such produce shall be so received; and where the duty chargeable upon any such bequest for the benefit of or to be enjoyed by different persons in succession, shall be chargeable at different rates, so that the same cannot be paid at one and the same time, but must be paid in succession as aforesaid, then and in such case all and every the person and persons having or taking the burthen of the execution of the will or testamentary instrument in which such bequest shall be contained, shall be chargeable with such duties in succession, in the same manner as such persons would be chargeable with the like duties in case of immediate bequest; unless the property bequeathed shall have been paid or otherwise satisfied to or vested in any trustees or trustee as aforesaid, in which case such trustees or trustee, or his, her, or their representatives, shall be chargeable with the duties for and in respect of such property so vested in him, her, or them respectively, in such and the same manner as if he, she, or they had had or taken the burthen of the execution of the will or testamentary instrument, by which such bequest shall have been made; and in like manner, where any partial interest shall be given, or shall arise out of any such property so to be enjoyed in succession, and such partial interest shall be satisfied or paid by the person or persons so enjoying such property, such person or persons shall be chargeable with the duties for and in respect of such partial interest, and shall retain and pay the same accordingly, in such and the same manner as if he, she, or they had had or taken the burthen of the execution of the will or testamentary instrument, by which such partial interest shall have been created; and in all such cases the person or persons so chargeable with duty, shall be debtors to the King's Majesty, his heirs and successors, in like manner, and shall be subject to the like penalties, as the person or persons having or taking the burthen of the execution of such will or testamentary instrument, are hereby made chargeable and subject to."

Plate, &c. while enjoyed in kind, not liable to duty till in possession of persons having power to dispose thereof.

Sect. 14 provides, "That no duty shall be paid on any articles of plate, furniture, or other things, not yielding any income, and given to or for the benefit of, or so as that the same be enjoyed by, different persons in succession, whilst the same shall be so enjoyed in kind only by any person or persons not having any power of selling

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or disposing thereof, so as to convert the same into money or other property yielding an income; but if the same shall be actually sold or disposed of, or shall come to any person or persons having power to sell or dispose thereof, or having an absolute interest therein, then, and in each and every such case, the same duty shall be chargeable and paid thereon as if the same had been originally given absolutely, and with full power to sell or dispose thereof, and shall be chargeable upon and paid by the person or persons for whose benefit the same shall be sold, or who shall have power to sell or dispose thereof, or an absolute interest therein, and shall become the debt of such person or persons; but shall not be a charge on any person or persons by reason of his, her, or their having assented to such bequest, as the person or persons having or taking the burthen of the execution of the will or testamentary instrument by which such bequest shall have been made."

Duty on legacies enjoyed in succession to be charged as such, whether taken under wills or by intestacy.

Sect. 15 provides, "That where any legacy, &c. shall be so given by any will or testamentary instrument, that different persons shall become entitled thereto in succession, the duty shall be charged thereon, as given to be enjoyed in succession, whether the person or persons entitled thereto shall take the same under or by virtue of such will or testamentary instrument, and the dispositions therein contained, or in default of such dispositions, and as entitled by intestacy."

Duty on legacies in joint tenancy to be paid in proportion to the interest of the parties.

Sect. 16. "That where any legacy, &c. shall be given to or for the benefit of any person or persons in joint tenancy, some or one of whom shall be chargeable with any duty hereby imposed, and some or one of whom shall not be so chargeable, the person or persons chargeable with duty shall pay such duty in proportion to the interest of such person or persons respectively in such bequest; and if any person or persons chargeable with duty, and entitled in joint tenancy as aforesaid, shall become entitled by survivorship, or by severance of the joint tenancy, to any larger interest in the property bequeathed than that in respect of which such duty shall have been paid, then and in such case all and every such person or persons so becoming entitled by survivorship, or by severance, shall be charged with the same duty as if the property to which such joint tenant or joint tenants shall so become entitled had been originally given to or for the benefit of such person or persons only."

Duty on legacies subject to contingencies, to be charged as for absolute bequests, &c.

Sect. 17. "That when any legacy, &c. shall be given subject to any contingency which may defeat such gift, and whereupon the same may go to some other persons or person, such bequest (unless chargeable as an annuity under the provisions herein contained)

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shall be charged with duty as an absolute bequest to the person or persons who shall take the same subject to such contingency, and such duty shall be paid out of the capital of such legacy, &c., notwithstanding the same may, upon such contingency, go to some person not chargeable with the same duty, or with any duty; and if such contingency shall afterwards happen, and the property so bequeathed shall thereupon go in such manner that the same, if taken immediately after the death of the testator or testatrix under the same title, would have been chargeable with a higher rate of duty than the duty so paid, the person or persons becoming entitled thereto shall be charged with and shall pay the difference between the duty so paid and such higher rate of duty."

How duty on legacies subjected to power of appointment shall be charged;

Sect. 18. "That where any legacy, or the residue or any part of the residue of any personal estate, shall be subjected to any power of appointment to or for the benefit of any *person or persons specially named or described as objects of such power* (*l*), such property shall be charged with duty as property given to different persons in succession; and in so charging such duty, not only the person and persons who shall take previous or subject to such power of appointment, but also any person and persons who shall take under or in default of any such appointment, when and as they shall so take respectively, shall, in respect of their several interests, whether previous, or subject to, or under, or in default of such appointment, be charged with the same duty, and in the same manner as if the same interests had been given to him, her, or them respectively, in and by the will or testamentary disposition containing such power, in the same order and course of succession as shall take place under and by virtue of such power of appointment, or in default of execution thereof, as the case may happen to be; and where any property shall be given for any limited interest, and a *general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment*, such property, upon the execution of such power, shall be charged with the same duty, and in the same manner, as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof; and where any property shall be given with any *such general power of appointment, which property in default of appointment will belong to the person or persons to whom such*

(*l*) [See *Att.-Gen.* v. *Pickard*, 3 Mee. & W. 552, 6 Id. 348; infra, pp. 761, 762.]

power shall also be given, such property shall be charged with, and shall pay, the duty by this act imposed, in the same manner as if such property had been given to such person or persons absolutely in the first instance, without such power of appointment." [See *Platt* v. *Routh*, 6 Mee. & W. 756; 3 Beav. 257.]

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Sect. 19. "That any sum of money or personal estate, directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate; unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof, after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: Provided, nevertheless, that in case, before the same or some part thereof shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase." [See *Att.-Gen.* v. *Hancock*, 2 Mee. & W. 563, 597.]

—and how on personal estates directed to be applied in purchase of real estates.

Sect. 20. "That estates pur auter vie, applicable by law in the same manner as personal estate, shall be charged with the duties hereby imposed as personal estate."

Estates pur auter vie, applicable as personal estates, to be charged as such.

Sect. 21 provides, "That if any direction shall be given, by any will or testamentary instrument, for payment of the duty chargeable upon any legacy or bequest out of some other fund, so that such legacy or bequest may pass to the person or persons to whom or for whose benefit the same shall be given, free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy to or for the benefit of the person or persons who would otherwise pay such duty."

Money left to pay duty not chargeable as a legacy.

Sect. 22. "That, in cases of specific legacies, and where the residue of any personal estate shall consist of property which shall not be reduced into money, it shall be lawful for the person or persons having or taking the burthen of the administration of such

Mode of ascertaining duty on property not reduced into money.

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effects, or the person or persons by whom the duty thereon ought to be paid, to set a value thereon, and offer to pay the duty according to such value; or to require the commissioners for management of the stamp duties to appoint a person to set such value, at the expense of the person or persons by whom such duty ought to be paid; and it shall be lawful for the commissioners to accept the duty offered to be paid, upon the value set by the person or persons having or taking the administration of such effects, or by whom the duty for the same shall be payable, without such appraisement, if the said commissioners shall think fit so to do; but, if the said commissioners shall not be satisfied with the value so set, on which the duty shall be so offered, it shall be lawful for the said commissioners, notwithstanding such offer, to appoint a person to appraise such effects, and to set the value thereon; on which value so set the said commissioners shall assess the duty payable in respect thereof, and require the same to be paid; but if the person or persons by whom such duty shall be payable shall not be satisfied with the valuation made under the authority of the said commissioners, and pay the duty accordingly, it shall be lawful for such person or persons to cause the valuation so made under the authority of the said commissioners to be reviewed by the commissioners of the land tax for the time being of the district or place where such effects shall be, at their next meeting after the said commissioners for management of the stamp duties shall have assessed and required payment of such duty as aforesaid, if fourteen days shall have elapsed between such time and the meeting of the said commissioners of land tax; and if not, then at the next succeeding meeting of the said commissioners, of which appeal six days' notice shall be given to the said commissioners of stamp duties; and the said commissioners of the land tax shall and may (if they think fit) appoint a person to appraise such effects, and set a value thereon; and shall and may hear and determine such appeal, in the same manner as in any other cases of appeal to them, and with the like authorities; and their judgment shall be final. And if the valuation made under the authority of the said commissioners of the stamp duties, in the case last mentioned, shall not be duly appealed from within the time aforesaid, or shall be affirmed upon appeal, the duty shall be paid according to such valuation; and if any variation shall be made on such appeal, the duty shall be paid according to such variation; and if the duty assessed in manner aforesaid shall exceed the duty offered to and refused by the said commissioners of stamp duties, the expense of such appraisement and other proceedings in assessing

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such duty shall be borne by the person or persons by whom such duty shall be payable. And if any dispute shall arise between any person or persons entitled to any such legacy, or residue, or part of residue, and any person or persons having or taking the burthen of the administration of such effects, with respect to the value thereof, or with respect to the duty to be paid thereon, the duty shall be assessed by the said commissioners of stamp duties, on reference to them by either party for that purpose; and if the value of any property on which such duty ought to be paid shall be in dispute, the said commissioners of the stamp duties shall cause an appraisement to be made thereof at the expense of the person or persons by whom such duty ought to be paid, in the manner hereinbefore directed in other cases, and assess the duty thereon accordingly. And if such person or persons by whom such duty ought to be paid shall be dissatisfied with such valuation, or with the assessment of duty made upon such valuation by the said commissioners of the stamp duties, the same shall be reviewed and finally determined by the said commissioners of the land tax, upon appeal to them within the time, and under the restrictions, and in the manner hereinbefore directed in other cases; but if such valuation or assessment shall not be duly appealed from within the time limited for that purpose, or shall be affirmed upon appeal, the duty shall be paid according thereto; and if any variation shall be made therein on such appeal, the duty shall be paid according to such variation; and in case the effects whereon any such duty shall be payable shall be at the distance of ten miles from London, then and in such case it shall be lawful to make the like application to such person as shall be deputed for that purpose by the said commissioners to act in their stead, in such cases within the county or district in which such effects shall be; and such person so deputed shall act in such cases, in all respects in the same manner as the said commissioners are hereby authorized to act, subject, nevertheless, to the instructions and control of the said commissioners."

Duty on legacies not satisfied in money, &c. to be paid according to the value of the satisfaction.

Sect. 23. "That where any legacy, &c. whereon any duty shall be chargeable by this act, shall be satisfied otherwise than by payment of money, or application of specific effects for that purpose, or shall be released for consideration, or compounded for less than the amount or value thereof, then and in such case the duty shall be charged and paid in respect of such legacy, &c. according to the amount or value of the property taken in satisfaction thereof, or as the consideration for release thereof, or composition for the same. Provided always, that if any legacy or bequest shall be made in satis-

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faction of any other legacy, &c. of any personal estate remaining unpaid, the duty shall not be paid on both subjects, although both may be chargeable with duty, but shall be paid on the subject yielding the largest duty."

If legatees refuse to accept legacies, duty deducted, the Court, in case of suit, may order them to pay costs;

Sect. 24. "That, if any person or persons having or taking the burthen of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, or any person or persons hereby made chargeable with duty, shall declare himself, herself, or themselves ready and willing, and shall accordingly offer to pay any pecuniary legacy, or residue, or part of residue, deducting the duty payable thereon, or shall in like manner offer to deliver or otherwise dispose of any specific legacy, or any specific property, part of any residue of any personal estate, to or for the benefit of the person or persons entitled thereto, or to any trustee or trustees for such person or persons, upon payment of the duty payable in respect thereof, and the person or persons entitled to such legacy, &c., or the trustee or trustees for such person or persons, shall refuse to accept such offer, and to give a proper release and discharge for such legacy or residue, or so much thereof as shall be offered to be paid, delivered, or otherwise disposed of as aforesaid, then and in such case, although no actual tender shall be made, if any suit shall be afterwards instituted for such legacy or effects, respecting which such offer shall have been made, it shall be lawful for the Court in which such suit shall be instituted, to order all costs, charges, and expenses attending the same to be paid by the person or persons who shall have refused to accept such offer, and to give or join in such release or discharge, or to order such costs, charges, and expenses to be deducted and retained out of such legacy or effects, together with the duty payable thereon, as the said Court shall see fit; and in case any suit shall be instituted for payment of any legacy &c. of any personal estate, and the person or persons sued for the same shall be desirous of staying proceedings in such suit, on payment of the money due, or delivering, or otherwise disposing of the specific effects demanded, after deducting or receiving the duty payable thereon, it shall be lawful for the Court in which such suit shall be instituted, if it shall see fit, on application in a summary way, to make such order for payment of such legacy, &c., or for delivering or otherwise disposing of such effects, and for payment of the duty payable thereon, and all such costs, charges, and expenses attending such suit, as shall be just."

—and in suits where the party sued may wish to stop proceedings on payment of bequests, deducting duty, the Court may make order therein.

If suit be instituted concerning administra-

Sect. 25. "That, if any suit shall be instituted concerning the administration of the personal estate of any person dying testate or

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intestate, or any part of such estate in which any direction shall be given touching the payment of any legacies or legacy of such person, or the residue of his or her personal estate, or any part thereof, the Court wherein such suit shall be instituted shall, in giving directions concerning the same, provide for the due payment of the duties hereby imposed; and in taking any account of any personal estate, or otherwise acting concerning the same, such Court shall take care that no allowance shall be made in respect of any legacy or part of legacy, or of any residue or part of residue, in any manner whatsoever, without due proof of the payment of the duties hereby imposed." [See *Foster* v. *Ley*, 2 Scott, 438; *Hicks* v. *Keat*, 3 Beav. 141; *Re Sammon*, 3 Mee. & W. 381.]

tion, the Court to provide for payment of the duty.

Sect. 26 provides, "That any person or persons having or taking the burthen of the execution of any will or other testamentary instrument, or the administration of the personal estate of any person deceased, may from time to time pay, deliver, or otherwise dispose of any legacy, or any part of any legacy, or make distribution of any part of the residue of any personal estate, on payment, from time to time, of such proportions of the duty hereby imposed, as shall accrue in respect of such part of such personal estate as shall be so administered."

Executors may discharge legacies on payment of the duty accrued.

Sect. 27. "That no person or persons having or taking the burthen of the execution of any will or testamentary instrument, or the administration of the personal estate of any person deceased, nor any trustee or trustees, or other person or persons hereby directed and required to account for any duty, shall, from and after the passing of this act, pay, deliver, or otherwise dispose of, or in any manner satisfy, discharge, or compound for any legacy whatsoever, or any part thereof, or the residue of any personal estate, or any part thereof, in respect whereof any duty is hereby imposed, without taking a receipt or discharge in writing for the same, expressing the date of such receipt or discharge, and the names of the testator, testatrix, or intestate, under whose will or testamentary disposition, or upon whose intestacy, the title to such legacy, &c. shall accrue, and of the person or persons to whom such receipt or dischage shall be given, and of the person or persons to whom such legacy, &c. shall have been given, or shall have belonged in consequence of intestacy, and the amount or value of the legacy &c., for which such receipt or discharge shall be given, and also the amount and rate of the duty payable and allowed thereon; and that no written receipt or discharge for any legacy &c., in respect whereof any duty is hereby imposed, shall be received in evidence, or be available in any manner what-

No legacy, liable to duty, to be paid without a receipt, containing certain particulars;

no receipt available unless duly stamped &c.

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ever, unless the same shall be stamped, as required by this act; and no evidence whatsoever shall be given of any payment, satisfaction, or discharge whatsoever, or of any release or composition of such legacy, &c., without producing such receipt or discharge, duly stamped as aforesaid, unless the actual payment of the duty hereby imposed shall first be given in evidence (*l*): Provided always, that a copy of the entry, in the books of the commissioners of the stamps, of the payment of such duty, shall be admitted as evidence thereof (*m*): Provided also, that payment of any annuity shall not be deemed a payment for which such stamped receipt shall be required, under the directions of this act, except the several payments which shall complete the payments for each of the first four years during which such annuity shall be payable; and in like manner, any payment in respect of any legacy or bequest, hereby directed to be charged with the duty in the same manner as annuities are hereby made chargeable with duty, shall not be deemed a payment for which such stamped receipt shall be required, except the several payments which shall complete the payments for each of the first four years, in respect of which such legacy or bequest shall be chargeable with duty as an annuity."

Copy of entry at Stamp Office of payment of duty, evidence.

Stamped receipts for annuities not required but on completing payments for each of the first four years.

Penalty.

Sect. 28. Penalty of 10*l.* per cent. on executors and trustees, for paying or receiving legacies without stamped receipts.

Receipts, how and when to be stamped.

Sect. 29. Receipts to be stamped within twenty-one days after date, on which an acknowledgment of payment of the duty shall be written, &c. Proviso, that receipts may be stamped within three months after date, on payment of duty, and 10*l.* per cent. penalty; but none

Releases to purchasers, &c., not within the act.

Release of legacy without payment, how far within the act.

(*l*) It is submitted that this section does not, as has been sometimes supposed, prevent a release of particular property charged with a legacy from being given in evidence, unless stamped as here required. The statutory provision evidently relates to the acknowledgment of the receipt for the legacy usually taken by the executor for his own discharge: a legatee, of course, may release a legacy without receiving it, and then clearly the duty does not attach; a fortiori, may he release any particular fund or property. It will be proper, however, in order to obviate any objection of this nature, that, where a legatee joins in the deed of conveyance to a purchaser, or executes any separate instrument, discharging the land or the purchaser from the legacy, the instrument should not express the legacy to be *paid*, but merely that the legatee has agreed to discharge the property in question from his lien or charge. Still it may be necessary for a purchaser to see not merely that the land is released, but that the duty has been paid; for, if, after the legatee has exonerated the land, he should receive the legacy without the duty being paid, the Crown, it is conceived, would have a lien on the property for the duty.

(*m*) [This copy must be proved like any other copy, and will then be evidence for all purposes; a copy signed by the comptroller of the stamp duties is not admissible, though his handwriting is proved. *Harrison* v. *Boswell*, 10 Sim. 380.]

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to be stamped unless the duty be paid, and they are brought to be stamped within the limited time (*n*).

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Sect. 30. Mistakes in paying duty may be rectified before suit, on payment of the difference within three months, and 10*l.* per cent.

As to rectifying mistakes.

Sect. 31, indemnifies persons paying or receiving money contrary to this act, on discovering the other offender.

Sect. 32. "That where, by reason of the infancy, or absence beyond the seas, of any person entitled to any legacy, &c., chargeable with duty by virtue of this act, the person or persons having or taking the burthen of any will or testamentary instrument, or the administration of such personal estate, cannot pay such legacy or some part thereof, although he, she, or they may have effects for that purpose, or cannot pay such residue, or some part thereof, although he, she, or they may have the same, or some part thereof, in his, her, or their hands, it shall be lawful for such person or persons to pay such legacy or residue, or any parts or part thereof respectively, or any sum or sums of money on account thereof, after deducting the duty chargeable thereon, into the Bank of England, with the privity of the accountant-general of the Court of Chancery, to be placed to the account of the person or persons for whose benefit the same shall be so paid; for payment of which money the said accountant-general shall give his certificate, as usual in such cases, on production of the certificate of the commissioners of stamps, that the duty thereon has been duly paid; and such payment into the Bank shall be a sufficient discharge for the money so paid in, provided the duty be also paid thereon as aforesaid; and such money, when paid in, shall be laid out by the said accountant-general, without any formal request for that purpose, in the purchase of 3*l.* per centum Consolidated Annuities; which, with the dividends thereon, shall be transferred and paid to the person or persons entitled thereto, or otherwise applied for his or their benefit, on application to the Court of Chancery, by petition or motion, in a summary way: Provided always, that if it shall afterwards appear that such money, or any part thereof, has been improperly paid into the Bank as aforesaid, it shall also be lawful for the said Court of Chancery, upon petition, in a summary way, to dispose thereof, and of the annuities

If by infancy or absence legacies cannot be paid, the money may be paid into the bank, and laid out in the 3*l.* per cents.

If such money be improperly paid in, the Chancery may dispose thereof.

(*n*) [By stat. 48 Geo. 3, c. 149, s. 44, the commissioners may stamp receipts for legacies after three months from the date thereof, on payment of the duty and penalty. And where any receipt has been signed out of Great Britain, if it is brought to be stamped within twenty-one days after its being received in Great Britain, the penalty may be remitted.]

Stamping receipt after date.

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purchased therewith, and the dividends received thereon, in such manner as justice shall require: Provided also, that if it shall appear that the duty paid in respect of any such sum of money was more than ought to have been paid, it shall be lawful for the person or persons who shall have paid such duty, to apply to the said commissioners for management of the stamp duties, to repay such excess of duty; and the said commissioners are hereby authorized, upon such application, to repay such excess of duty to the person or persons who shall appear to them entitled to receive the same, or to pay such excess of duty into the Bank, with the privity of the said accountant-general, for the benefit of the person or persons entitled, there to be placed to the same account, and to be applied in the same manner as the same would have been applicable if paid together with the remainder of the legacy or sum of money in respect of which the same shall have been paid; and the said commissioners are hereby authorized to make such payments respectively out of the monies in their hands arising from duties imposed by this act. And if the duty paid to the said commissioners shall appear to be less than the duty which ought to have been paid, it shall be lawful for the person or persons who paid such money into the Bank as aforesaid, upon payment of the full duty to the said commissioners, in such manner as the same ought to be paid, with such penalties, if any, as ought to be paid in respect thereof, to apply to the Court of Chancery, in a summary way, for the repayment of the further sum paid to the said commissioners for such duty, out of the money in the Bank so paid in by such person or persons, or the produce thereof; which payment the said Court is hereby authorized to order." [See *Whopham* v. *Wingfield*, 4 Ves. 630; *Wilson* v. *Brownsmith*, 9 Id. 180.]

If more than the proper duty has been paid, the commissioners for stamps may return the excess;

and if less, on payment of the full duty, the Chancery may order repayment to the party.

If it shall appear to the commissioners for stamps, at the end of two years after the death of any person, that it will require time to collect the effects, or be difficult to ascertain the residue of the personal estate, the duty may be compounded for.

Sect. 33. "That, if at the end of two years after the death of any person deceased, it shall appear, to the satisfaction of the said commissioners of stamp duties, that it will require time to collect the debts or effects of such person then outstanding, or that, from circumstances, it will be difficult to ascertain or adjust the amount of the clear residue of the personal estate of such person liable to duty, and the parties interested therein shall be desirous of compounding for the duty thereon, it shall be lawful for such parties respectively, with the consent of the commissioners of stamp duties, to make application to the Court of Exchequer at Westminster, if the deceased person resided in England or elsewhere, except in Scotland, and to the Court of Exchequer in Scotland, if the deceased resided in Scotland, for leave to compound such duty, stating upon

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oath the particulars of the personal estate for which such composition shall be proposed to be made, by affidavit to be filed in the said Court, and declaring at the same time upon oath, whether any other property of the deceased, then outstanding, besides the property for which such composition shall be proposed to be made, hath come to the knowledge of the said parties, or any of them, and the nature thereof, and the circumstances attending the same; and in such case, it shall be lawful for the said Court of Exchequer in England or Scotland, as the case may be, to appoint a proper person to set a value on the personal estate, or such part thereof, for which no duty shall have been charged, and which shall be specified in such affidavit as the property for which such composition shall be desired, and to adjust and settle the duty which, justly and equitably under all circumstances, ought to be paid in respect of such personal estate so specified; and thereupon, it shall be lawful for the said commissioners, and they are hereby required, if the said Court of Exchequer, to which such application shall be made, shall confirm the said adjustment and settlement, and order the duty to be accepted accordingly, and by authority of such order to accept payment of the sum so adjusted and settled, in full discharge of the duty on so much of such personal estate as shall be so specified, and according to such order, and to enter the same in their books accordingly, and to grant certificates thereof, expressing the receipt of such duty by way of composition under such order; and every such person to whom such certificate shall be granted, and every future representative of the same estate, and all persons entitled to the benefit of the property for which such composition shall be so paid, shall be discharged from any further payment of duty on the same; and in all future payments of such property, it shall be lawful for the persons having or taking the burthen of the execution of any will or testamentary instrument disposing such property, or the administration thereof, to pay, apply, and dispose of the same, and for all persons entitled to the benefit thereof to receive the same, without having the receipts and discharges in writing, hereby required to be given and taken for the same, stamped as hereinbefore directed; provided such receipts or discharges shall express the same to be given under the authority of such composition as aforesaid, and not liable to duty: Provided always nevertheless, that the duty shall be charged and paid upon all and every part of the personal estate of such person deceased, other than that which shall be specified in such affidavit as aforesaid, and included in the valuation in which such composition shall have been made as aforesaid, and for which the said Court of Exchequer

Duty to be paid on any part of personal estates not included in the composition.

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shall allow and order such composition to be taken as aforesaid, in the same manner as if no such composition had been made; and all and every person and persons shall be liable to all the like penalties and forfeitures for not duly paying the duty for such personal estate not compounded for, and subject to the like rules, methods, and directions, for charging such duty, as such person and persons respectively would be liable to, if such composition had not been made."

If any legacy be refunded, the duty to be repaid.

Sect. 34. "That if at any time after payment of duty on any legacy, &c., of the personal estate of any person deceased, any debt shall be recovered against the estate of such deceased person, or any loss shall happen, by reason whereof, or for any other just cause, any legatee or other person, by whom any legacy, &c. hath been received or retained, shall be obliged to refund the same, or any part thereof, then in every such case it shall be lawful for the said commissioners of stamp duties, and they are hereby required, on due proof made on oath as aforesaid, to their satisfaction, of the amount of such sums refunded, and that by reason thereof there hath been an over-payment of duty, to settle and adjust the amount of such over-payment, and to repay the same out of the money in their hands, arising from the duties by this act imposed, or to allow the same in future payments, as the case may permit or require."

Executors, previous to retaining their legacies, to transmit the particulars, with the duty offered, to the commissioners of stamps, who shall charge the same agreeable to this act.

Sect. 35. "That whenever any person or persons having or taking the burthen of the execution of any will or testamentary instrument or the administration of any personal estate as aforesaid, shall be entitled to any legacy, &c. of the personal estate of any testator, testatrix, or intestate, such person shall be chargeable with the duty whenever he, she, or they shall be entitled, in the due course of administration, to retain to his, her, or their own use, any part of the said estate, in satisfaction of such legacy, &c., and every such person, before any such retainer shall transmit to the said commissioners of stamp duties, or their officers, a note containing the particulars of such legacy, &c. intended to be retained, and the amount or value thereof, and the duty which such person or persons shall offer to pay thereon; and the said commissioners shall charge and assess the duty thereon, in such manner as the duty shall be chargeable thereon by virtue of the provisions in this act contained, and such duty shall be paid accordingly; and on payment of the said duty, the said receiver-general of the said duty, or officer appointed to receive the same, shall, at the foot of a duplicate of the said assessment duly stamped, in such manner as the said commissioners

shall direct for such purpose, give a receipt for such duty in such form of words as the said commissioners shall direct, which receipt shall be a discharge for the duty expressed therein; and in case any such person or persons shall neglect to pay such duty as aforesaid, within fourteen days after the same ought to have been paid as aforesaid, every such person and persons shall forfeit and pay treble the value of the duty which ought to have been paid."

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Penalty for neglect of payment of duty for fourteen days.

Sect. 36. "'And whereas doubts have arisen upon the construction of the said acts of the 20th, 23rd, and 29th years of his Majesty's reign, whether the duties thereby imposed were intended to be imposed on all legacies, bequests, and dispositions by will or testamentary instrument whatsoever:' Be it enacted, &c., That all receipts and discharges whatsoever for legacies specific and pecuniary, and of any nature or kind whatsoever, and for all personal estate whatsoever, in any manner given or disposed of by will or testamentary instrument, whether by way of annuity or other particular bequest, or by way of residue, or share of residue, or otherwise howsoever, as well as on personal estate, distributable upon intestacy, except such dispositions as shall be made by any will or testamentary instrument, with respect to which the duties imposed by the said former acts are hereby repealed, shall be deemed and taken to be receipts and discharges for legacies, within the intent and meaning of the said former acts respectively; and all and every person and persons to whom any such legacy, or any part of any such legacy, shall be due and payable at the time of passing this act, or who at the time of passing this act shall be entitled to any residue, or any share or part of any residue, of any personal estate, under any such will or testamentary instrument, or upon intestacy, and also all and every person and persons who shall become entitled to any legacy, &c., of any such personal estate, after the passing of this act, upon which no duty is imposed by this act, and upon which the duties imposed by the said former act remain in force and unrepealed, shall, upon receipt or other satisfaction or discharge of any such legacy, &c., sign and give a receipt or discharge in writing, duly stamped as required by the said former acts respectively; and the person or persons having or taking the burthen of the execution of any will or other testamentary instrument, or the administration of any personal estate, shall have the like powers to require such receipt or discharge in writing, and to retain the duty payable in respect thereof, and the person and persons paying, or otherwise satisfying or discharging, and the person or persons receiving, or being otherwise satisfied for such legacy, &c., shall be in like manner debtors for the duty imposed on such

Receipts for legacies except those by wills, respecting which the duties imposed by acts mentioned in the preamble, are repealed, to be deemed receipts within the meaning of those acts;

and such receipts to be given for legacies due at passing this act, and for legacies becoming due afterwards, on which no duty is hereby imposed.

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receipt or discharge in case of non-payment of such duty, and to the like penalties for enforcing due payment thereof, as by this act are provided with respect to the duties hereby imposed on legacies, and residue of personal estate of persons dying after the passing of this act."

Improper payment under void authority.

Sect. 37 directs that if administration be made void, and any duty shall have been improperly paid, it shall be repaid; but if it ought to have been paid, it shall be allowed in account with the rightful executor.

Sections 38, 39, and 40, impose penalties for perjury, &c.

Receipts duly stamped, free from all other duties.

Sect. 41. "That every receipt or discharge for any legacy, &c. of any personal estate, which shall be duly stamped as required by this act, shall be free and discharged from all stamp duties imposed by the said recited acts, or by any other act of Parliament upon receipts or discharges for money; and that every such receipt or discharge which shall be duly stamped as required by the said recited acts, and upon which no new duty is imposed by this act, shall be also free and discharged from any stamp duty imposed by any other act upon receipts or discharges for money."

Powers of former acts relating to stamps, to extend to this act.

Sect. 42. "That all powers, provisoes, articles, clauses, allowances, and all matters and things prescribed or appointed by any former act or acts of Parliament, relating to the stamp duties on vellum, parchment, and paper, and not hereby altered, shall be of full force and effect with relation to the duties hereby imposed, and shall be applied and put in execution for the raising, levying, collecting, and securing the said duties hereby imposed according to the true intent and meaning of this act, as fully and effectually to all intents and purposes, as if the same had severally and respectively been hereby re-enacted, with relation to the said duties hereby imposed."

The remaining sections are not of general interest.

Stat. 42 Geo. 3, c. 99, s. 2. Process to compel executors to account.

[By stat. 42 Geo. 3, c. 99, s. 2, where executors, &c. shall not have paid the duty, the Court of Exchequer may grant a rule against such executors to deliver in an account on oath of legacies paid. See *In re Pigott*, 1 Cr. & M. 827; *In re Robinson*, 2 Mee. & W. 407; *In re Vivian*, 1 Tyrwh. 379; *In re Berwick*, 3 Dowl. P. C. 703; *In re Sammon*, 3 Mee. & W. 381.]

Legacies payable out of real estate made liable to duty by stat. 45 Geo. 3, c. 28.

Under the statute 36 Geo. 3, c. 52, legacies were only liable to duty so far as they were paid out of the personal estate; but the statute 45 Geo. 3, c. 28, s. 4, enacts, "that every gift by any will or testamentary instrument of any person dying after the passing of this act, which, by virtue of such will &c., shall have effect, or be satis-

fied out of the personal estate of such person so dying, or out of any personal estate which such person should have power to dispose of as he or she shall think fit (*o*); *or which shall have been charged upon, or made payable out of any real estate*, or be directed to be satisfied out of any monies to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this act; Provided always, that nothing herein contained shall be construed to extend to the charging with the duties by this act granted any specific sum or sums of money, or any share or proportion thereof charged by any marriage settlement, or deed or deeds, upon any real estate, in any case in which any such specific sum or sums, or share or proportion thereof, shall be appointed or apportioned by any will or testamentary instrument under any power given for that purpose by any such marriage settlement, or deed or deeds." [*Pickard* v. *Att.-Gen.*, 6 Mee. & W. 350.]

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Stat. 45 Geo. 3, c. 28.

Acts not to extend to appointments under settlements.

Section 5 provides, that the duties thereby granted upon legacies charged upon, or made payable out of, any real estate, or out of the monies to arise by the sale of real estate, should be accounted for and paid by the trustees to whom the real estate should be devised out of which the legacy should be payable; or if there were no trustees, then by the persons entitled to such real estate, subject to such legacy, or the person or persons empowered or required to pay the same; and the said duties should be retained and paid according to the regulations of the statute 36 Geo. 3, c. 52.

By whom such legacy duty to be paid.

Sections 7 and 9 direct that the duties granted by this act shall be levied according to the provisions of the 36 Geo. 3, c. 52.

[It has been held, that a rent-charge, accompanied with powers of distress and entry, is liable to the duty; and that it is immaterial that the land subject to the charge is devised over in equal shares to two persons, one in fee, and the other for life; *Att.-Gen.* v. *Jackson*, 2 Cr. & J. 101; and it is immaterial whether the rent-charge is created by way of limitation of a use, or in any other form; *Stow* v. *Davenport*, 5 Ad. & E. 359; 2 Nev. & M. 805. The effect of giving a rent-charge free from duty is to throw the duty on the devisee or other person taking the land; Id. See *Noel* v. *Henley*, Dan. 211. And where a testator gives a power to appoint a rent-charge by way of jointure to any woman the donee may marry, any jointure created

Rent-charges.

Charge under power in will.

(*o*) [*In re Cholmondeley*, 1 Cr. & M. 149.]

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under the power, whether by deed or will, is liable to the duty: *Att.-Gen.* v. *Pickard*, 3 Mee. & W. 552; *Pickard* v. *Att.-Gen.*, 6 Id. 348. If appointed by will, it is not a legacy under that will; Id. It has been doubted whether a rent-charge in fee is liable to duty, vide ante, p. 742, n. (*k*).]

Charge for maintenance of devisee not liable to duty.

[Where a testator gave real estate to trustees for 500 years, with remainder to the first and other sons of C. J., and directed the trustees of the term, after paying certain annuities, to apply so much of the rents as they should think fit, but not exceeding a certain sum in any one year, towards the maintenance and education of C. J. during her minority, and to accumulate the surplus for her benefit, and, after her majority, to pay all the rents to her for her separate use for life: it was held, that the duty was not payable on the money applied for maintenance; nothing but what is a charge upon the estate of another person will come within the act: *Shirley* v. *Ferrers*, 1 Phill. 167.]

Remarks upon stat. 36 Geo. 3, c. 52.

The enactments respecting the legacy duty seem to be framed upon fair and equitable principles; with a few inconsiderable exceptions, indeed, in which, probably rather from inadvertence than design, those principles appear to have been infringed. Thus, the 17th section of the statute 36 Geo. 3, c. 52, while it provides, reasonably enough, that, upon the happening of a contingency, which transfers a legacy from one person to another, the substituted legatee, if chargeable with a *higher* rate of duty than that which has been already paid by the prior or original legatee, shall pay the difference of duty, does not provide, that, in the converse case, (*i. e.* where the substituted legatee would be liable to a *lower* rate of duty), the difference shall be returned. No provision seems to have been made for the case of a legacy being given for life, or any other partial interest, to one person, and becoming eventually divisible among several, so as to be split into fractional shares below 20*l.*, the minimum at which the duty commences. If, in such a case, the ulterior legatees happen to be persons (whether relations of, or strangers to, the testator) chargeable with the same rate of duty as the particular legatee, the legacy will, by the 12th section of the act, have already borne the duty out of the capital, and as the act does not direct that it shall be refunded, the ulterior legatees become onerated with the duty; though, if, from disparity of relationship, such legatees should happen to be chargeable with a *different* rate of duty, as the duty will have been paid, not out of the capital in the first instance, but by the legatee for life pro tanto, as an *annuitant*, the ulterior legatees will be exempt.

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As to charitable bequests.

Where exemption was claimed for a charitable bequest, on the ground that the testator's bounty flowed in such a channel, that no individual receives a benefit equal to 20*l.*, it was answered, that in cases of this nature the legacy, being devoted to a specific purpose, is liable as a whole, without regard to the amount of the shares of the objects to become benefited in the course of its application, which depends upon subsequent accidents, and cannot previously be ascertained. *In re Francklin's Charity*, 3 Sim. 147 ; 3 You. & J. 544 ; [where the testator "gave and bequeathed to the poor of the parish of H. 50*l.* per annum for ever, to be laid out at Christmas in bread, and distributed by the minister and churchwardens to the most needy objects in the parish." It was in vain argued, that the amount of duty could not be ascertained, because the degree of relationship of the objects was unknown. The Court replied, that the legacy was given in such a manner that kindred seemed to be out of the question. By the 36 Geo. 3, c. 52, s. 11, (ante, p. 744), however, it is provided, that, where the benefit is so given that the amount or value of it can only be ascertained by the actual application of the fund allotted for the purpose, the duty shall be charged upon the several sums which shall be applied from time to time as distinct legacies. And, therefore, *In re Wilkinson*, 1 Cr. M. & R. 142, where a testator gave the residue of his estate to his executors, in trust to divide the interest half-yearly among poor pious persons in 10*l.* or 15*l.* as they should see fit, it was held that no duty was payable on such residue, although, if any individual, by receiving the bounty more than once, should get 20*l.* or upwards, the executors would be accountable for duty on that amount. The Court said, that it was difficult to distinguish *Ex p. Francklin*; which may, therefore, be considered as having been overruled. (See 1 Mee. & W. 244). They said, too, that it was clear that gifts to bodies corporate and societies were liable to the duty, notwithstanding the provisions as to consanguinity. The decision was affirmed in error upon an information filed for the purpose. *Att.-Gen.* v. *Nash*, 1 Mee. & W. 237. A distinction must here be taken. If the legacy is given to a charitable society as it were beneficially, *i. e.* by way of augmenting its funds, and for its general purposes, the duty attaches; but if it is given to such a society as trustee and for specific purposes, then it will depend upon the nature of those purposes whether the duty is payable or not. This distinction will perhaps reconcile the decision in *Att.-Gen.* v. *Fitzgerald*, 7 Jurist, 569, with the above case. There a testator gave to his executors all the residue of his property, "to be by them appropriated to the education of the children of the poor in Ireland, principally those in or about the city of Limerick,

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or as they should in their better judgment deem meet to give the bequest its most extensive efficacy." A scheme for the administration of the fund was approved by the Court; and it was held, that the duty was payable on the gross amount of the residue. Sir L. Shadwell, V. C., said:—"It appears to me, that there is a material distinction between *Ex p. Francklin's Charity* and *Ex p. Wilkinson*. In the former, there was a gift of a perpetual annuity, to be disposed of as a charity: in the latter, the Judges seemed to consider that there was a gift of a sum in gross to trustees who had no power but to select objects, and when that selection took place, then the legacy was to be disposed of, just as if it was not a charitable legacy. It seems to me, that that of itself affords a material difference between the cases; for, if it is a charity in its original state, this Court must have the dominion over it, and will determine in what manner the thing shall be employed; and long before any of the parties participate in the legacy the duty must be paid." "It is the same thing, whether a sum of money is at once given for the benefit of a school already established, or for the benefit of a school to be established. * * * Money is not to be paid to the children, but a certain portion of knowledge is to be infused into their minds."]

Real estate directed to be converted chargeable as personalty. *Att.-Gen.* v. *Holford.*

Real estate directed to be sold, which, by the general rule of equity, is impressed with the character of personal estate, is liable to the duty, and is not exonerated by the fact of the legatee electing to take it as real estate. Thus, where a testator devised to A. and B. his real estate, including a share in the New River Water Works, upon trust, as soon as possible, after his decease, to sell the same by public auction, the profits arising therefrom to be deemed part of the residue of his estate thereinafter disposed of, or go in aid, if necessary, of the rest of his property in discharge of his pecuniary legacies; the testator then bequeathed various legacies, and devised the residue of his estate and effects to A., his heirs, executors, administrators, and assigns, and appointed A., B., C., and D., executors. The personal estate being sufficient to discharge the debts and legacies, the New River share was not sold, but passed in specie to A., the residuary devisee and legatee. Duty was claimed by the Crown on this share under the clause in the stat. 48 Geo. 3, c. 149, (the act then in force), which imposes the duty on the clear residue of "monies to arise from the sale, mortgage, or other disposition of any real or heritable estate, directed to be sold, mortgaged, or otherwise disposed of" by will, &c., (and which, for this purpose, corresponds with the present act). It was contended, for the defendant, that since he had elected to take the property as real estate, it

was exempt from the duty, which was imposed, not on the value, but on the clear residue of the monies to arise from the sale, which necessarily supposed an actual conversion. But the Court held, that it was liable. Thompson, C. B., observed:—"This is not a bequest of the property in question, directing it to be sold with a view solely to the payment of debts, but it is directed to be sold in all events, and to be turned into money. The profits arising therefrom were, by the will, to go in aid of the rest of his property, if necessary, in discharge of his pecuniary legacies; but it is not directed to be sold for that purpose merely, but generally to be sold, and the money to go as residue of his personal estate. Now, all the residue of the testator's estate goes to Holford, the defendant, a stranger in blood; and this property would be considered in equity as sold, although it might not be in fact sold: and, supposing him to have died before election it would have gone to his personal representatives; and shall it be said, that, by not selling it according to the directions of the will he shall be enabled to intercept the duty? He has, it is true, a right to take it in its original state, as between himself and the executors; but he must not, by so doing, be permitted to evade the duty to which, if sold, it would have been liable; and it must be considered as having been actually sold by the executors, and that the money arising from the sale had been by them paid over to the devisee. *Att.-Gen.* v. *Holford*, 1 Price, 426. [*Advocate-Gen.* v. *Ramsay's Trustees*, 2 Cr. M. & R. 224, n. But if it is in the discretion of the trustees to sell or to retain the property in its original state, the duty does not attach, at least, if the trustees do not exercise their option of selling. *In re Evans*, 2 Cr. M. & R. 206; *Att.-Gen.* v. *Mangles*, 5 Mee. & W. 120. In the former case, Lord Lyndhurst, C. B., observed, that every subject had a right so to shape the disposition of his property as to avoid the legacy duty, if possible; and that there was no fraud in doing so. It was not necessary that the word "direct" should be found in the will; it was sufficient if it was the object of the will, and the obvious intention of the testator that a sale should be effected; but it was essential that such an intent should be manifested. The trustees had sold a part of the property, not because it was necessary for the purposes of the trusts, but because it was thought beneficial for the cestuis que trust; and, about ten years after the testator's death, the rest of the estates were sold by order of the Court. It was held, that the duty did not attach on the proceeds of these sales. Here the trusts were first declared upon the assumption that the property was to be enjoyed in specie, and then a discretionary power of sale was given. In *The Att.-Gen.* v. *Mangles*, the converse case oc-

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curred; there was a trust for sale followed by a discretionary power not to sell; the executors having power "to cause any part or parts of the said real or personal estate to be valued instead of being sold, and of allotting such parts to any or either of my children at the amount of such valuation, *but to be considered as personal estate.*" The Court held, that no duty was payable upon the lands not sold; but expressed so decided an opinion that duty was payable on the produce of the lands which had been sold, that the counsel for the executor abandoned the point. This part of the decision is inconsistent with that in *Re Evans*, unless some principle can be pointed out for distinguishing the circumstances of the two cases. To make the liability depend upon events subsequent to the will seems to be inconsistent with the words of the act, and with the principle of the decision in *Att.-Gen.* v. *Holford*. As to what amounts to a trust for absolute conversion, see 1 Jarm. Wills, 523.]

Interest on capital up to the time of rendering account liable to duty.

In *The Att.-Gen.* v. *Cavendish*, Wightw. 82, the Court of Exchequer decided, that duty was payable on the residue of a testator's effects, not merely according to its amount at the time of the death, but on the aggregate of the capital, and the interest accrued upon such capital up to the time of the rendering the account to the stamp office.

Crown entitled to the produce of fund, which ought to have been appropriated to the payment of duty.

In *Thomas* v. *Montgomery*, 3 Russ. 502, the same rule was contended to apply to pecuniary legacies; but the case seems not to have raised the point. The facts were, that the Duke of Queensbury (who died in 1810) by his will bequeathed legacies to an immense amount, (no less than 605,000*l.* and upwards), which he directed to be paid within three months after his decease. Shortly after the testator's death, a suit in Chancery was instituted on behalf of the legatees. The legacies remained unpaid for several years, in consequence of certain claims on the assets, and the complicated state of the accounts. In 1818 and 1824, however, two large sums were, under orders of Court, divided among the legatees rateably; on both which occasions legacy duty was paid on these sums. In 1827 there still remained 347,000*l.* due for principal and interest on the legacies; but only about 11,000*l.* of this sum was for capital, the residue being made up of interest. The Crown claimed the duty on the whole sum remaining unpaid; the legatees insisted, that it only attached on the 11,000*l.*, the amount of capital remaining unpaid. Lord Lyndhurst, C., said—"It is the duty of the Court to put all parties as nearly as possible in the same situation as if the legacies had been paid three months after the testator's death. A certain sum has been appropriated to the satisfaction of the legatees and the payment of the duty; for a sum appropriated for the legacies must be consi-

dered as appropriated in part for the payment of the duty which attaches upon the legacies. It must be considered as so appropriated from the time when the legacies were payable; at that time, a certain proportion of the appropriated sum would have belonged to the legatees, and a certain proportion of it would have belonged to the Crown; and it appears to me to be the justice of the case, and not contrary to the acts of Parliament, but rather consonant to their whole scope and spirit, that the legatees should have that part of the fund which they would have had if the appropriation had been made at the time fixed by will, and that the Crown should have the full benefit of that part of the fund, which it would have been incumbent on the Court, at the same time, to have set apart for the discharge of duty (*p*). LEGACY DUTY.

I do not understand the Lord Chancellor, in this case, to have decided, as the learned reporter considers him to have done, that "when a legacy is not paid at the time appointed by the testator, legacy duty is payable not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest which is ultimately received by the legatee; for, his Lordship expressly declares, that the Crown and the legatees ought to stand in the same situation as if the legacies had been paid three months after the testator's death; meaning, it is submitted, that the Crown should have the accumulations arising from the fund which ought *then* to have been applied in paying the duty. The distinction between the cases of *Att.-Gen.* v. *Cavendish* and *Thomas* v. *Montgomery* is, that in *that*, duty was allowed on the interest, and in *this*, interest on the duty; or to speak more accurately, in the latter case, the Crown took the produce of the fund, which had become by previous constructive appropriation its own. Remarks upon *Thomas* v. *Montgomery*.

[The principle of the cases of *Att.-Gen.* v. *Cavendish* and *Thomas* v. *Montgomery* appears to be, that the legacy duty is considered as part of the assets belonging to the Crown at the time of the death; so that, whatever profit is made of that portion of the assets, or ought to have been made of it, belongs to the Crown. Thus, if the assets are employed in trade, the profit made of such part as constituted the per-centage payable as duty would, in accordance with the general principles of equity, belong to the Crown. And in this view it is indifferent whether we calculate the duty upon the aggregate fund at the time of payment, or calculate it upon the amount

(*p*) [Where the duty is payable upon a fund in Court, the practice seems to be to order the transfer of a proportionate part of the fund itself. *Kilpin* v. *Kilpin*, 4 Law Journal, N. S., Ch. 17.]

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which would have been payable at the testator's death, and add the profits or increase referable to that particular amount. For, if D represent the sum eventually payable to the Crown, $\frac{d}{100}$ the rate of duty, l the amount of the legacy, $\frac{i}{100}$ the annual increase or profit made by the fund, t the number of years between the testator's death and the accounting with the stamp office; then, if the duty is to be calculated upon the aggregate amount of principal and profits, $D = \frac{dl}{100} + \frac{d}{100} \cdot \frac{ilt}{100} = \frac{d}{100} + \frac{dilt}{10000}$. If, on the other hand, we take the original amount of duty, and the profits on that amount, we have $D = \frac{dl}{100} + \frac{it}{100} \cdot \frac{dl}{100} = \frac{d}{100} + \frac{itdl}{10000}$; the same expression. If the rule were that the Crown was entitled to common interest on the original amount of legacy duty, and not to the profits actually made, then of course the difference would be material. Upon the principle of *Thomas* v. *Montgomery*, if, without the wilful default of the executor, no profits were made, the Crown would not be entitled to anything beyond the original amount of duty.]

[However, in a case which occurred upon the statutes 20 Geo. 3, c. 28, 23 Geo. 3, c. 58, and 29 Geo. 3, c. 51, in holding that the interest of a tenant for life of personalty was not liable to legacy duty under those acts, (which imposed the duty on the *receipt* for the legacy), Lord Loughborough said:—"The growing profits after a testator's death are not subject to the tax." *Green* v. *Croft*, 2 H. Bl. 34. This case has been cited in support of a distinction between specific and residuary legacies; (Collins on the Stamp Laws, 363); but the language of Macdonald, C. B., in *Att.-Gen.* v. *Cavendish*, is entirely opposed to such a distinction under the present act. "The clause in the act 36 Geo. 3, c. 52, that is most material in the present case is the 35th, but neither in this nor in any other is any particular time mentioned; as far as it goes it seems to speak of the time present; it certainly does not refer back, and all the other clauses seem of the same description; it seems, therefore, to refer to the time when the residuary legatee was performing the act of retaining. The 6th section directs the duties to be paid by the executor upon retainer; thus the punctum temporis is the act of retaining. The 22nd, though referring to specific legacies, strongly applies; 'to set a value thereon' clearly refers to the time present; how easy to have said 'what the value was at his death,' if the Legislature had so intended it. The 23rd is also material. The duty which is to be charged and paid in respect of any legacy, 'according to the amount or value of the property taken in satisfaction thereof,'

must mean according to the value of the property at the time of taking it in satisfaction for the legacy. * * * Take the case of a lease for three lives, and the two youngest die off, must you go back and compute the value as on their lives, when only one of 80 years is left? If taken from the death in such instances of decrease, it would be evident oppression. But it is quite indifferent to the legatee whether the duty be taken at the death or ten years afterwards; he pays the same. If taken immediately, 10*l.* only is paid; if he waits ten years, that would give 5*l.* interest, and then 15*l.* is demanded; yet he still pays only the 10*l.* which he should have paid originally. *The public had a right to the* 10*l. at first, and so have they to the profit made by that* 10*l. after it had legally vested in Government.*"] LEGACY DUTY.

[In *Izon* v. *Butler*, 2 Price, 34, it was held, that the forgiveness of a bond debt by will was a legacy to that amount, upon which duty was payable; (see *Maitland* v. *Adair*, 3 Ves. 231; *South* v. *Williams*, 6 Jur. 332; *Davis* v. *Elmes*, 1 Beav. 31); and in *Att.-Gen.* v. *Holbrook*, 3 You. & J. 114; 12 Price, 407, after the death of the principal in a bond, the obligee by will released the surety, who was his brother, by these words; "I forgive the bond debt entered into by W. and my brother J. H." J. H., the surety, was also named one of the testator's executors. Interest had been paid on the bond up to the testator's death. It was held, that duty at 2½ per cent., as on a legacy to a brother, was payable on the principal, but not in respect of any interest from the testator's death to the settlement at the legacy-duty office. Graham, B., said, "The general residue of a testator's estate is altogether a very different matter from the particular legacies given by his will. What the general residue may be cannot be known till all the charges upon the estate are satisfied; and when that is done, the interest, and all accretions which may in the meantime have accumulated, then become and must be considered as part of the general residuum of the testator's estate, forming in fact a part of the corpus of the final legacy to the residuary legatee; on the contrary, particular bequests must be taken to come into operation at the time of the testator's death, and to take effect from that moment, subject only to such necessary delay in their satisfaction as circumstances render unavoidable. On such legacies neither the interest, nor any other accretion, can form part of the corpus subject to duty. But in this case, all interest due on the bond had been paid up to the testator's death; and after his decease, the debt, by force of the will, was gone for ever." The decision is altogether very questionable, and the report not very clear. So far as it can Release of debt. *Att.-Gen.* v. *Holbrook.* Release of surety's bond. Duty at what time to be calculated;—on residue; —on particular legacy.

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be treated as an authority on the point under consideration, it seems to shew that the Crown is not entitled to charge interest on the legacy duty, unless interest is made of it by the executor. It was suggested by Hullock, B., that J. H. might possibly recover the amount of duty from his principal; if so, that should have been a conclusive argument for charging duty at 10 per cent., the principal being a stranger.]

Provision for payment of debts.

[Of course, a direction for the payment of the debts of another person (as, a deceased husband of the testatrix) is a legacy to the creditors. *Foster* v. *Ley*, 2 Scott, 438. But a direction to apply a particular portion of the personal estate in payment of particular creditors of the testator himself, whose debts are specified in the will, is no legacy to them, even though their remedy would otherwise have been barred by the Statute of Limitations, (the operation of which was prevented by this specific provision; vide ante, Vol. 5, p. 146). It was consequently held, in a case of this kind, that there was no lapse of the claims of such of the specified creditors as died in the lifetime of the testator, and that the sums payable to the creditors were not liable to duty. *Williamson* v. *Naylor*, 3 You. & C. 208.]

Debts barred by the Statute of Limitations.

What is retainer of a legacy by trustees and executors.

What is payment or retainer of a legacy, within the legacy-duty acts, has often been the subject of controversy; the struggle being, to determine whether a fund bequeathed to executors in trust, and held by them as such trustees, when the accounts of their executorship are wound up, is to be considered as having been retained or satisfied at this period. If the matter were res integra, one should scarcely have hesitated to pronounce that it was; but a perusal of some modern decisions of the Court of Exchequer will shew the insecurity of acting on any such conclusion.

Att.-Gen. v. *Lady Manners.*

Thus, in *Att.-Gen.* v. *Manners*, 1 Price, 411, where Lord W. M., by his will, dated 8th of July, 1771, gave the sum of 13,000*l.* to his executor, J. M., in trust to invest the same, and to pay the income to his reputed son, T. M., for life; and, after his decease, one moiety to be paid to the eldest son, and the other moiety to the younger children of T. M. The testator died shortly after the execution of his will; J. M., the executor, retained the 13,000*l.* in his own hands, and paid the interest to T. M., until the year 1794, when he (T. M.) and his children applied to the executors of J. M., the executor, (who was then dead), to invest the money in the funds; which they did in their own names. T. M. died in 1812. The question was, whether the legacy to the children of T. M. was liable to the duty of 8*l.* per cent. imposed by stat. 48 Geo. 3, c. 149, on lega-

cies given to strangers in blood by the will of any person who died before the 5th of April, 1805, *and which should be paid, delivered, retained, satisfied, or discharged, after the 10th of October*, 1808. It was contended, for the legatees, that the executors, as soon as they had assets in their hands applicable to the payment of the legacy, had "received" and "retained" it, within the meaning of the act, or, at all events, that it was discharged in 1794, when it was invested in the funds, upon the trusts of the will; so that, if the Bank had failed, the executors, and not the legatees, must have borne the loss; but the Court decided, that the legacy was liable to the duty. Thompson, C. B., after stating the case, observed—"In point of fact, it remained matter of uncertainty, till after the death of T. M., who would be entitled to receive the legacy; for it was not given to the children of T. M., then living, but one moiety was bequeathed to his eldest son, and the other to his younger children. At the time of making the will, and at the death of the testator, there were only two children of T. M. living. This bequest, therefore, would certainly vest in all the children of T. M., who should be living at the time of the testator's death; for it is not a bequest of a moiety to his eldest son then living, but to the eldest son, and of the other moiety to the younger children. Now, although their separate shares vested in all the children of T. M. living at the death of Lord W. M., they were still liable to open and let in any other children coming in esse during the life of the father, the bequest being to the younger children, and not to the younger children then living. The consequence of this construction is, that the capital could not be paid till the death of T. M., because, as he was tenant for life, it would be uncertain, till his death, who would be entitled to it, as that depended on what children he should leave at that time. In this situation, J. M., the executor of Lord W. M., does nothing in the shape of appropriating the legacy which is given to him as executor, to be set apart to answer the purposes of the testator's will. He retains it indeed, as it appears, in his own hands, but it is never divided from the bulk of his personal estate; he keeps it in this way, and pays the interest to T. M., the person entitled to it under the will, during his (the executor's) life, up to the period of his death. After that time, which was in the year 1773, the present defendants, who are the executors of J. M., and consequently are now also executors and personal representatives of Lord W. M., for the first time do what is something like an appropriation of this legacy; but that was merely laying it out and investing it in the funds, in their own names, it being uncertain who would become

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absolutely entitled to it, till the death of T. M. That event has now happened, and on that it appears, that his two children, T. M. and W. M., were the only persons who ever became entitled to the principal of the legacy; and they could not, till that time, have known what would have been the amount of their shares. They had each disposed of their interest (*q*): W. M., by his will, in 1791, having devised his moiety to his children, and T. M. having settled his moiety on his wife for life, with remainder to his children, with a direction that it should be laid out in land to be limited to those uses. Now, as to the question of this being a legacy retained after the 10th of October, 1808, it is, in fact, actually retained at this moment, and retained for the benefit of those legatees who became entitled to it on the death of T. M., that is, for the benefit of their representatives; and we are of opinion that it comes precisely within the description in the act of the 48 Geo. 3, of 'a legacy which has been retained after the 10th of October, 1808, for the benefit of persons strangers in blood' to the testator; and being given by a will dated so far back, the testator having died in the year 1771, it is subject to the duty demanded by this information."

Hill v. *Atkinson.*

A question of this nature came under the consideration of Lord Eldon in *Hill* v. *Atkinson*, 2 Mer. 48; 3 Pri. 404; where a testator gave to H. and T. 3000*l.*, upon trust to invest the same on Government securities, and to pay the interest to A. Atkinson for her life, and after her decease, (subject to a contingency which never happened), to T. Leake; and the testator directed H. and T. to invest the 3000*l.* in the funds as soon as conveniently might be after his decease, and appointed them executors of his will. The testator died in 1776, when the execution of the trusts became the subject of certain suits in Chancery; and by decree pronounced at the Rolls in 1779, it was declared that A. Atkinson was entitled for life to the interest on the legacy, and that T. Leake was entitled to the prin-

(*q*) This fact seems to be quite immaterial; for the only question was, whether the legacy had or had not been retained, and not who was entitled; for clearly, a fund may be set apart for the payment of a legacy, although it be quite uncertain to whom such legacy will eventually belong. [*Coombe* v. *Trist*, 1 Myl. & Cr. 69.] One should rather have expected, from the previous line of argument adopted by the Lord Chief Baron, to have found in this place some reasons why the investment in the funds was not a retainer within the meaning of the act, since he had in the former part of his judgment, laboured to shew, that the mere act of holding the money and paying the interest to the legatee, was not a retainer, *because the fund had not been divided or severed from the bulk of the estate;* and yet, after referring to the fact of the investment, which, plausibly at least, might have been contended to amount to such a severance, he makes no attempt to shew that *this* superadded circumstance did not vary the case.

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cipal; and it was ordered that the principal should be paid into the Bank, to be laid out in the name of the accountant-general in the purchase of Bank Annuities, in the causes in question, the interest to be paid to A. Atkinson for her life, and at her decease to T. Leake (who was then an infant), and who should on attaining twenty-one, or sooner if occasion required, be at liberty to apply for a transfer. Under this decree, the executors paid the 3000*l.* into the Bank in 1779, which was laid out by the accountant-general as directed by the decree. T. Leake married, and the reversionary interest in the legacy was settled on her marriage. A. Atkinson died in January, 1807. In 1808, the Bank Annuities were transferred to the trustees of the marriage settlement. It was contended, that inasmuch as, in 1779, no legacy duty existed, the first act imposing that duty (20 Geo. 3, c. 28), having passed more than a year afterwards, the legacy was free from duty; but the Crown insisted that it came within the 48 Geo. 3, c. 149, as a legacy paid, delivered, retained, satisfied, and discharged *after* the 10th of October, 1805; and the case of *Att.-Gen.* v. *Manners* was much relied upon. But Lord Eldon decided that the duty did not attach. His Lordship said, "the executors, by paying in the money under the decree of this Court, effectually divested themselves of the possession of, and all control over, the legacy in question, which was immediately after laid out in the purchase of stock, upon trusts which the accountant-general was called upon to declare. Then comes the statute 20 Geo. 3, (1780), imposing a duty rateably on 'receipts for legacies,' which duty is augmented by two subsequent acts, still following the same description; under which, as was decided in *Green* v. *Croft*, 2 H. Bl. 30, no duty was payable in cases where a receipt could not be given; and accordingly, Heath, J., observed that it was a great error in the legacy acts, that legacies themselves were not chargeable, but only the receipts for them. And the statute of 36 Geo. 3, (27th of April, 1796), was afterwards passed, expressly to remedy the defect then complained of. At the time of the investment of this legacy, T. Leake (the person entitled in succession), was under age, and incapable of giving any receipt or discharge. In 1792, she married; her interest in the legacy became the subject of the settlement made on that marriage; and in March, 1808, (A. Atkinson being then dead), the stock in which it had been invested was transferred under an order of the Court to the trusts of the settlement. The case of *Att.-Gen.* v. *Manners* is an authority, as far as it goes, against the prayer of the present petition; because it would seem that, in this case, if the legacy had been clearly ap-

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propriated, the Court would have held the duty not payable. Whether there was an appropriation in that case, or not, is not now to be considered. It was the opinion of the Barons that an executor, who is also a trustee, shifting a legacy from his hands as executor into his hands as trustee, does not thereby appropriate the legacy; and upon this opinion they acted. But if, where a legacy has been paid into Court under a decree, and the trusts are declared accordingly, it is to be said there has been no appropriation, that would be to deny what has never before been called in question. Then the question is, whether, regard being had to the operation of the other clauses of that statute, it can be said to have been the intention of the Legislature, in the 44 Geo. 3, (adopting the former), to make those legacies 'given by or derived from persons dying previous to the 27th of April, 1796,' for which no receipt or discharge could have been given, and which would have been consequently exempt from the payment of duty under the previous statutes, liable to the duties then imposed: and my opinion is, that such is not the true construction. Upon the whole, I do not think that, either under the construction of the statutes, or upon the authority of the case in the Exchequer, this legacy can be considered not to have been so effectually appropriated in 1779, as to be exempt from the operation of any of the acts."

Att.-Gen. v. *Wood.*

The question again arose in the case of *Att.-Gen.* v. *Wood*, 2 You. & J. 290, where a testator bequeathed to his executors A., B., and C., 14,400*l.* Five per cent. Annuities, upon trust as to 8000*l.* of the said annuities, to pay the interest and dividends to A. Buckland during her life for her separate use, and for the maintenance of her children, and after her decease to transfer the said 8000*l.* Five per cent. Annuities unto and amongst the child and children of A. Buckland, who should be living at her decease, on their attaining twenty-one; and he bequeathed all other his estate, after payment of debts, &c., to A. Buckland. The testator died in 1794, and the 8000*l.* Five per cent. Annuities were transferred from his name to those of A., B., and C., and were afterwards converted by Act of Parliament into 8400*l.* New Four per cents. In the same year the executors accounted for and paid over the residuary estate of the testator to Mrs. Buckland. They continued to pay to her the dividends on the 8400*l.* New Four per cents., until her decease, in 1826. She left three children surviving, who were now absolutely entitled to the legacy. The question was, whether this legacy was liable to the duty under the statute 55 Geo. 3, c. 184, as a legacy "paid, delivered, retained, satisfied, or discharged after the 31st day of August,

1815." The Court was of opinion that the duty attached. The grounds upon which the learned Barons arrived at this conclusion can only be collected from a statement of the judgments delivered by them seriatim. Alexander, C. B.—"I entertain no doubt whatever upon this question, which is, whether, under the particular circumstances stated in this case, corrected as it has been by inserting a few words suggested in the course of the argument, we can say that this legacy has been delivered, retained, satisfied, or discharged, within the meaning of that clause in the act of Parliament, or in the schedule of that act of Parliament referred to, so as to save it from the additional duty imposed in case it should not be delivered, retained, satisfied, or discharged before a certain period. Now, I think, that these facts do not shew that it has been delivered, retained, satisfied, or discharged. I think that nothing has been done that can bear that construction. It has not been delivered to any body, the legacy is not satisfied, nor is it at this moment discharged. In truth, those things could not be, because there was nobody to whom it could be delivered; nobody by whom it could be retained; nobody who could receive satisfaction, or give a discharge for it. It could not be done; and not being capable of being done, it is hardly necessary to say, that it has not been done. The whole argument turns upon this, that what is called an appropriation is, according to the meaning of this act, a delivery, retainer, satisfaction, or discharge. In my opinion, that is very inaccurately argued. There is a case decided in this Court, apparently upon great consideration, by Lord C. B. Thompson, in which, under circumstances similar to the present, it was held not to be a species of appropriation that could fall within any of the descriptions in this schedule in the act. Against that has been cited a case at a subsequent period, determined by Lord Eldon, for whose decisions I have certainly the utmost respect, knowing, as I do, how very much they were considered, and upon what a sound knowledge of the law all those decisions are founded. It is not the case itself that can be justly cited against that former decision, for that comes under circumstances so strikingly different, that it affords a marked distinction, and shews it did not come within the spirit of this act of Parliament, but the language found in the report of the case by Mr. Price, in which Lord Eldon says, that appropriation means payment. Now, if I were disposed to give the utmost effect to these words, to the utmost extent that the counsel for the defendant could desire, I should not think myself at liberty to consider that which is but an obiter dictum, and not necessary to the decision of that case, an authority sufficient to overrule

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that which was actually done by this Court upon great consideration. But I do not think, even giving full effect to those words, that such a consequence should follow. All that the Lord Chancellor says, is, that a transfer by an executor to himself as trustee, is an appropriation of the legacy. It has been so held for a considerable length of time. For particular purposes unquestionably it is an appropriation. If an executor transfer into his own name as trustee the amount of a particular legacy, and acts upon that transfer, that is an appropriation as against many persons, and in particular as against himself. But the question here is, whether that act so done is to be considered as a delivery of the legacy as against the revenue and this act of Parliament: whether it is a retainer, or a satisfaction, or a discharge. Now the fact is, that it has not been delivered, it has not been retained, it has not been satisfied, and it has not been discharged; but the executor and trustee is at this moment liable in consequence of having this fund in his hands. Can any body of good sense contend, that it has been delivered, retained, satisfied, or discharged, when the same money is now in his hands, and he is liable for it to the persons beneficially entitled to this legacy? The case of *Hill* v. *Atkinson* is a case in which the executor or trustee, or whatever name you give him, was actually discharged, as much as if there had been persons in being entitled to give him a legacy receipt, if a receipt were necessary at that time. The money was paid into Court, and distinguished from all the rest of the testator's effects, but above all taken out of the hands of the executor, and paid in to the name of the accountant-general of the Court, under the directions of the Court, for the benefit of the legatees. That, therefore, was an actual payment by the executor, for the use of those persons, whoever they might be. Whether it was a vested interest, or a contingent interest, the executor was discharged, which in this case he undoubtedly is not. I think that case has no application to the present, and I am very clearly of opinion that this party is liable to the legacy duty." Hullock, B.—"I am of the same opinion. The only question is, whether the legacy can be said to have been paid or discharged before the death of Mrs. Buckland. Now, the simple state of the facts is, that the testator leaves a sum of 8000*l.* to trustees and executors, in trust that the dividends and proceeds of the money should be paid to A. Buckland for her life. There could be no pretence for saying that during her life any thing could be done with the money. What is to become of it after her death? Upon her decease it is to be paid to her children, if she have any, when they come of age. They had

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no right to the money till they became of the age of twenty-one years, and, after an interval of twenty years, during which the executors and trustees have transferred the fund into their own names, they must be deemed to hold it secundum subjectam materiam. They paid her during her life the proceeds of the money; and, upon her death, what takes place? It appears, that her children, who had an immediate right to receive the legacy, had not attained the age of twenty-one. What does the surviving executor do? He sells the stock, and the proceeds are now in his hands. For what purpose? To pay it over to those who are in law entitled to receive it. But was there any person named, provided the children were not entitled to receive it? No one whatever. Then in what way are those words, that are found in the 55th Geo. 3, to be construed? As to the hardship of the case, we have nothing to do with it; the question is, whether this duty was liable to be paid at any period prior to the time when it could be paid according to the bequests of the will. The words are:—'For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who died before or on the 5th day of April, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged? When was it paid? It could not be paid until now; it ought to be paid now; the gentleman has it in his hands, and ought to pay it over. When was it delivered? Delivered, means the delivery of the stock, or something capable of being delivered; it could not be delivered till now, and now it must be paid in money. Retained, means, where an individual has it in his hands as executor, or, according to the language of this case, he retains it for the parties, the legatees, for the benefit of those entitled to receive. Satisfied and discharged, means, when it is paid; those words are synonymous to those which precede them, but not one of those words could, in my judgment, be applied to the state of facts that existed anterior to the death of Mrs. Buckland. If that be so, I should say, according to the true construction of this act of Parliament, that no legacy duty could attach till that time; and I think the way in which it was put shews that such ought to be the sound construction of that clause. If it is a legacy to a son or daughter, it is subjected to a lesser duty than that which attaches upon foreigners [*qu.* strangers in blood?], and there might have been a difference in the rate. It appears to me, upon the fair construction of the statute, that that is the conclusion at which the Court ought to arrive. But when there is a case, that in my judgment is precisely

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in point, and certainly not necessarily touched or affected by the other case cited, it does appear to me, that we ought not lightly to depart from a decision already pronounced, and one in which I entirely concur." Vaughan, B.—"It does not appear to me, that these claims could be satisfied till the event of Mrs. Buckland's death. I think, upon the plain letter of the act, and upon the authority of the case that has been alluded to, that the construction which my learned Brothers have put upon the enactment is correct."

Remarks upon *Att.-Gen.* v. *Wood.*

It will be observed, that in the case just stated, the executors and trustees had not executed an express declaration of trust, but they had done that which it is conceived was equivalent; they had retained the money in their hands when they made up their accounts as executors, and paid over the balance to the residuary legatee. From that moment they ceased to hold the fund in question in the character of executors, and possessed it as legatees in trust. If the fund, instead of being given to the executors, had been bequeathed to other legatees in trust, would not the payment by the executors to such trustees have been a satisfaction for this purpose? and can the fact of the executors and trustees being the same persons vary the principle? The doctrine, that money remaining in the hands of an executor may, without any manual transfer, change its character, is strikingly illustrated by the rule, that an action at law will lie against an executor for a share of a residue retained by him after rendering his accounts to, and accepting a release from, the residuary legatees: *Gregory* v. *Harman*, 1 Moo. & P. 209; (though it is well known that an action cannot be maintained against an executor for the recovery of a pecuniary legacy; *Deeks* v. *Strutt*, 5 T. R. 690; unless he has made a special promise to pay out of the assets; *Hawkes* v. *Saunders*, Cowp. 289); the circumstance of the retention after the winding up of accounts as executor being considered to turn it into a loan. [See, too, *Hart* v. *Minors*, 2 Cr. & M. 700.] Indeed, the word "retained" necessarily supposes the possibility of a continuing possession under a changed character; nor, it is probable, would the Court of Exchequer deny this, but would insist, that, in the present instance, the expression was intended only to apply to the case of an executor "retaining" a legacy for his own benefit. But this narrow construction of the word seems to be inconsistent with the sixth section of the statute of 36 Geo. 3, c. 52, ante, p. 741, which expressly directs executors to pay the legacy duty "upon retainer for their own benefit, *or for the benefit of any other person or persons;*" which clause affords a strong, and it is conceived a conclusive argument for giving to the word a corresponding construc-

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tion in the subsequent statutes now under consideration. For when in those statutes reference is made to a retainer, the Legislature must, by necessary and irresistible inference, be presumed to mean such a retainer as it had, in the previous act, designated as the period or occasion for paying the duty. Besides, supposing that in case of a retainer made since the statute of 36 Geo. 3, the duty payable under that act (being lower than the present rate) to have been actually paid (as it ought) on the occasion of the executor's retaining the legacy, could it be held that the difference ought now to be paid at the distribution? How the learned Barons would have combated the argument founded on the terms of the statute of 36 Geo. 3, c. 52, does not appear, as it was not brought to their attention, and not the slightest allusion is made to it in their judgment. Though the case of *Hill* v. *Atkinson* was certainly distinguishable in its circumstances from that of *Att.-Gen.* v. *Wood*, yet the principles laid down by the learned Barons in the latter case, and those recognised by Lord Eldon in the former, are not so easily reconcileable. His Lordship evidently thought, that, consistently with the case of *Att.-Gen.* v. *Manners*, a legacy may be satisfied for the purposes of the act, although it may not have reached the hands of the person eventually entitled to the beneficial interest, and that it was quite immaterial whether the legacy was paid over by the executor to a third person, as a legatee in trust, or retained by himself in that character. The Barons, on the other hand, were of opinion that nothing less than an actual payment and satisfaction of the legacy to the person beneficially entitled, or at least the actually parting with the fund by the executors, would prevent the duty from attaching; and though some of them laid much stress upon the fact of the objects of the bequest not being ascertainable during the life of the prior legatee for life, yet it is difficult to see how, consistently with the general grounds of their judgment, the adjudication could have been otherwise, if the ulterior legacy had bestowed a vested interest on an ascertained object. Whether the decision will be acquiesced in, or the experiment made of again agitating the question before the distinguished Judge now [in 1832] at the head of the Court of Exchequer, remains to be seen; at all events, the case of *Att.-Gen.* v. *Wood* must at present govern the conduct of executors, to whom it prescribes the task of deducting the duty imposed by stat. 55 Geo. 3, c. 184, *on every legacy that remains in their hands, not actually parted with prior to the* 31*st of August*, 1815, *notwithstanding that they are express legatees in trust of such legacy, and have, by any the most formal act, even before any legacy duty*

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was in existence, severed or divided it from the general personal estate, with a view to its appropriation to the specified purposes of the trust. The doctrine, however, it should be remembered, only applies to persons who are executors as well as trustees, and not to those who are trustees merely; and therefore, if a trustee has, prior to August, 1815, received from an executor a legacy not then liable to duty, to be invested upon trusts, he may now pay or transfer it to the persons who, under those trusts, may have become entitled to it, without deducting the duty.

Whether legacy which has paid the duty at the time of retainer, is liable to any further sum at distribution.

An important question growing out of the doctrine of the case of *Att.-Gen.* v. *Wood*, is, whether it would apply, if, instead of the legacy having been retained before the creation of the duty, the retainer had occurred since the stat. 36 Geo. 3, c. 52, and the executors on the occasion of such retainer had paid the duty imposed by that statute, or any subsequent act prior to that of the 55 Geo. 3, c. 184. According to the principle of the arguments of the Court, pushed to their full extent, it might seem that even in such a case it would still be incumbent on the executors to account for the higher duty which had become payable in the interval between the periods of the retention and the distribution of the fund; for, if a legacy is to be considered as undischarged for all the purposes of the duty while it remains *in* the hands of the executors, and *out of* the hands of the beneficial legatees, the only effect of the antecedent payment of duty would be to entitle the executors to receive credit for the amount so paid in the ultimate payment; but, as this would involve the necessity of accounting for the legacy duty at two distinct periods, which is opposed to the general tenor of the acts, it is not likely that the point will be so determined. The Courts, in all probability, would rather venture to depart from the doctrine in this case at the cost of some violation of principle, or (which would be still better) overrule the decision itself, than, in deference to its authority, to make an adjudication evidently contravening the intention of the Legislature. If the necessity of accounting for the duty at two distinct periods had been pointed out to the learned Barons, as a consequence of their construction of the present act, probably they would have paused before they had adopted it; but that consequence is now only to be avoided by overturning the decision, or by raising a distinction in reference to the fact of duty having been paid at the time of the retainer, which is inconsistent with its reasoning, and subversive of its principle.

Coombe v. *Trist.*

[The authority of *Hill* v. *Atkinson*, was followed in *Coombe* v. *Trist*, 1 Myl. & Cr. 77, where 10,000*l.* was bequeathed to A. for

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life, and after her decease to such of her children as should attain twenty-one, or being daughters should marry, and, if no such children, as she should appoint, and in default of appointment over. Under a decree made in 1798, in a suit for having the legacy secured, the executors paid the amount into Court, and before November, 1802, it was invested in stock in the name of the accountant-general, and placed to the separate account of A. It was held, that this was a sufficient payment of the legacy within the 55 Geo. 3, c. 184. Lord Lyndhurst, C., said, "In *Hill* v. *Atkinson*, the legacy was not paid to the party beneficially entitled, nor could it have been so paid without the agreement of the person who had the prior life interest in the fund; but the payment into Court was considered to amount to precisely the same thing. That would apply in a case where contingent interests were given, for the Court in such a case would equally take possession of the capital, at the same time discharging the executor, and holding the fund upon trust for those who had contingent interests and might become eventually entitled."]

Att.-Gen. v. *Hancock.*

[In the case of *Att.-Gen.* v. *Hancock*, 2 Mee. & W. 563, a testator, who died in 1791, devised his real estates to W. V. and J. M., and their heirs, to the use of W. M for life, remainder to his issue, remainders over. He gave the residue of his personal estate to his executors W. V. and W. M., upon trust for conversion and investment in the purchase of land, to be conveyed to W. V. and J. M., to the uses declared of his real estates, with a direction for the interim investment of the money on the usual securities in the names of his executors, the income to be paid to the persons who would have been entitled to the rents of the purchased lands. Before 1796 and before the 36 Geo. 3, c. 5, the executors invested the produce of the residuary personal estate on mortgage in their own names. W. M. survived W. V. and died without issue; and in 1832 his executors paid the money so secured on mortgage to J. M., who, on the death of W. M., became tenant in fee under the original will. It was held, that this was a payment after the 31st August, 1815, within the 55 Geo. 3, c. 184. It was argued, that the 19th section of the 36 Geo. 3, c. 52, (ante, p. 749), providing for the mode of paying the duty on legacies directed to be laid out in the purchase of real estate, amounted to an imposition of a new duty, and could not have been meant to act retrospectively; but the Court said that the duty was always intended to be levied on such legacies, although where receipts were not given the payment might have been evaded. Upon the other question, Lord Abinger, C. B.,

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said, "It appears that by the course of events the same residue might devolve upon a succession of persons before it was laid out in land, and that the executors are expressly charged to keep it in their control until laid out in land; and it appears by the pleadings that events have happened by which the residue, being still personal estate, has devolved upon J. M. under the provisions of the will, and that it was paid and satisfied to him in the year 1832 by the defendants in the execution of the will. It was, therefore, in the state and form to which the act of 55 Geo. 3, c. 184, applies; and it was paid within the time which that act embraces. No question can arise upon any former appropriation or supposed payment of it; as it is clear, that, if a legacy passing to several persons in succession can be properly said to be paid and satisfied to each of them in turn, the words of the schedule and of the 36 Geo. 3, c. 52, which provides for such cases may, apply to the last of these payments if made after the 31st August, 1815, although one or more of the first payments may have taken place before that date. It is not necessary, therefore, to refer to the cases which have been cited at the bar to ascertain what shall be deemed a payment and satisfaction of a residue, and at what time it shall be deemed to have taken place, when by the admitted facts the payment and discharge in question did not take place until 1832." This case may be thought to be distinguished from those which preceded it in the same court, by the circumstance that here the executors and the ultimate trustees were not the same persons, and that the trust property had not reached the latter. But it is evident that the Court was prepared to come to the same conclusion if the trust for purchasing real estate had not existed, and properly, if their decision upon the actual facts before them was correct, for the testator had, in fact, appointed two sets of trustees,—one set, his executors, to be trustees of the property so long as it retained its personal character; the other, to be trustees of it after its conversion. If, indeed, the purchase had been made and the question had been raised whether the executors by that act had paid or appropriated the legacy, the Court would have been placed in a dilemma which might possibly have convinced them of the unsoundness of the reasoning upon which their judgment under the circumstances which actually occurred was founded. In *Hay* v. *Fairlie*, 1 Russ. 128, where the question was, whether the executors had made a specific appropriation of a legacy in India by investing it in their own names in trust for the several parties entitled, Lord Gifford, M. R., said, it was clear that, if it had been invested in the names of other persons than the executors as trustees, it would have

been specifically appropriated; and it could make no difference that the same persons happened to hold the double character of executors under the will and of trustees for the children.]

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[Where a legacy is given to a married woman, who is related to the testator, the duty is calculated in respect of that relationship, although the husband is a stranger, or related either in a nearer or more remote degree. And where a legacy is given to a husband and wife, either absolutely or for their lives, and one of the legatees is related to the testator and the other not, or they are both related to him in different degrees, the legacy duty is payable as if one moiety had been given to the husband and the other to the wife. (See 36 Geo. 3, c. 52, ss. 16, 17, ante, p. 747). *Att.-Gen.* v. *Bacchus*, 9 Price, 30, 11 Id. 546; *Att.-Gen.* v. *Burnie*, 3 You. & J. 531.]

Legacy to wife, or husband and wife.

If an executor pays a legacy in full, without retaining the duty, both he and the legatee are debtors to the Crown for the amount of the duty, (see stat. 36 Geo. 3, c. 52, s. 6, ante, p. 741), which, if paid by the executor, may be recovered by him from the legatee, in an action of assumpsit. Thus, where a testatrix devised all her real estates to trustees, upon trust, and bequeathed to the defendant an annuity of 100*l.*, clear of all deductions, during her life, secured upon the testatrix's real estates; the testatrix died in June, 1808; during eight years the trustees paid the annuity to the legatee, and the persons to whom she had sold and assigned it, without deducting or demanding the duty; in 1816 they paid the duty at the Stamp Office; and it was held, that the plaintiffs were entitled to recover the amount as money paid on the defendant's account; and that the fact of her having assigned the annuity did not affect their claim against her. *Hales* v. *Freeman*, 4 J. B. Moore, 21; 1 Br. & B. 391. [*Stow* v. *Davenport*, 5 B. & Ad. 366. Where the land on which the legacy was charged was devised as to one moiety to A. for life, as to the other to B. in fee; it was held, that both parties were liable to the Crown for the duty. *Att.-Gen.* v. *Jackson*, 3 Mee. & W. 386. So, where the entirety was devised to A. for life, subject to an annuity, A. was held liable to the Crown. *Att.-Gen.* v. *Pickard*, 3 Mee. & W. 552. "By the regulations with respect to the payment of the legacy duty on annuities, the value of the annuity is, in the first instance, estimated according to the tables contained in the 36 Geo. 3, c. 52. That amount is to be paid by four quarterly payments, and I think the highest charge of duty is 10*l.* per cent.; the extreme case, eighteen years' purchase. It is obvious, therefore, upon making a calculation, that the money to be paid in respect of the first instalment, must fall greatly short of the sum which the annuitant would

Executor and legatee both liable for duty to the Crown, and executor paying it may recover from the legatee.

Devise for life, subject to annuity, is liable for the legacy duty.

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be entitled to receive in that year. The person, therefore, paying the annuity is never required to be in advance, and he is allowed to retain that payment out of the payment made to the annuitant." Per Lord Lyndhurst, C. B., 2 Cr. & J. 115. These observations of the learned Judge referred to life annuities alone, but the act contains tables of values of annuities for terms certain up to ninety years, the value of an annuity of 100*l.* for ninety years being stated at 2426*l.* This appears to be calculated on the assumption that the interest of money is four per cent., in which case the value of a perpetual annuity of that amount would be 2500*l.*, one instalment of the duty on which, at the highest rate, would be 62*l.* 10*s.*, little more than half of a single year's payment. So that his Lordship's conclusion may be extended to every case. Vide ante, p. 742, n.]

What words exempt a legatee from legacy duty.

The duty is payable out of the subject of the bequest, unless the will contains words of exemption shewing that the general personal estate is to bear the charge. What expressions have this effect is often a litigated point. Where a testator, after giving pecuniary legacies, directed his executors to make payment of all the legacies, "*without any deduction,*" as given and bequeathed by that his will, at the expiration of six months from his decease, or sooner if convenient—Lord Eldon was of opinion, after much hesitation, that the words "without deduction" referred to the duty, which, therefore, was to be paid out of the general estate. *Barksdale* v. *Gilliat*, 1 Swanst. 562. [In *ales* v. *Freeman*, 1 Br. & B. 391, a contrary decision was made, but the point does not seem to have been raised.] So, where a testator gave all his real and personal estate to his executors, in trust, among other things, out of the dividends and interest of the trust monies, to pay to his daughter, J. D., for her separate use, for her life, an annuity, of 46*l.* *clear of all deductions whatsoever*, by half-yearly payments: Sir L. Shadwell, V. C., ruled that the legacy-tax could not be deducted; though it was contended, for the contrary construction, that the words excluding deduction referred to the payment of the land-tax, being applicable to the annuity only as a charge on the real estate. *Dawkins* v. *Tatham*, 2 Sim. 492. [So, where the direction was to pay certain annuities and legacies "clear of property-tax and all expenses whatsoever attending the same." *Courtroy* v. *Vincent*, Turn. & R. 433.] A direction that annuities should be paid to the legatees, "without any deduction or abatement out of the same, on any account or pretence whatsoever," was construed as a direction to pay the annuities in full, without deducting the duty, on the ground that there were no

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other deductions to which the annuitants were liable that the testator could have had in his contemplation. *Smith* v. *Anderson*, 4 Russ. 352.

[So, where lands were devised to the use that A. should take thereout an annuity, to be paid "clear of all taxes and deductions whatsoever;" remainder to B. for life. It was held, that A. took the annuity free from duty, and that B., who had paid it, could not recover it back from A., although he might originally have disclaimed the devise. *Stow* v. *Davenport*, 5 B. & Ad. 359; 2 Nev. & M. 805. So, a legacy of 100*l.*, "to be paid to J. D., free of all expense," was held to be payable clear of duty. *Gooden* v. *Dotterel*, 1 Myl. & K. 56; and in *Louch* v. *Peters*, Id. 488, the duty was held to be within a gift of "one annuity or clear yearly sum of 500*l.*," to be paid out of real estate, "clear of all taxes and outgoings." Lord Brougham, C., said, "Where a testatrix gives a *clear* annuity, and directs it to be paid clear of all taxes and outgoings, she would be a good deal surprised to find it held, that the legacy duty was considered to be neither an outgoing nor a tax; the very tax and outgoing which, from the nature of the thing—from the subject-matter being a legacy—she was more likely to have present to her mind than any other. To deny that the legacy duty is an outgoing, surely seems strong, especially in reading a will; but to doubt that it is a tax appears really a subtlety that passes all understanding." To the objection that there were other taxes and outgoings to which the words might refer, his Lordship replied, that the very same objection might be urged if the point were as to the exemption from any one of such other taxes and outgoings. In *Smith* v. *Anderson*, 4 Russ. 352, Sir J. Leach, M. R., had said, "I admit that it is to be stated as the fair result of Lord Eldon's judgment in *Barksdale* v. *Gilliat*, that he considered that a direction to pay annuities without deduction would not extend to exempt the annuitants from the legacy duty, if from the nature of the property out of which the annuities were payable there was any other deduction to which the annuities might be subject." Upon this, Lord Brougham said, "On this case of *Smith* v. *Anderson*, agreeing entirely in the decision, I cannot go along with the commentary of the learned Judge upon Lord Eldon's judgment, for you will in vain search through the case as reported in 1 Swanst., to find a word pointing towards the proposition that the words 'without deduction' would not clear a legacy from the duty if there were from the nature of the property on which it is charged other outgoings that might be intended." See 2 You. & C. 456.]

Annuity "clear of all taxes and deductions."

Stow v. *Davenport.*

"Free of all expense."

Louch v. *Peters.*

"Clear of all taxes and outgoings"

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Sanders v. *Kiddell.*
Gift of a "*clear* annual sum."

[But, in *Sanders* v. *Kiddell*, 7 Sim. 536, where the testatrix bequeathed "such a sum of money as that the annual produce thereof when invested would produce the *clear* yearly sum of 500*l.*," upon certain trusts, the trust as to one-fifth being for M. C. G. for his life, and after his decease for any wife who might survive him, during her life, and after the decease of the survivor for his children, in equal shares, at twenty-one or marriage; Sir L. Shadwell, V. C., held, that the legacy was not given free from duty, because it appeared from the will that what the testatrix directed to be done was meant to be done at once. Now M. C. G. might or might not marry a relation of the testatrix, and his children might or might not be related to the testatrix, so that the fund to be set apart could not be ascertained at once, and therefore the word "clear" must be taken to refer to the expenses of investment, &c. As the legacy would have been free of these expenses, though there had been no express exemption, this decision reduces the word "clear" to a nullity.]

Gude v. *Mumford.*
"Clear yearly sum."

[On the other hand, in *Gude* v. *Mumford*, 2 You. & C. 448, where the testator gave "one annuity or *clear* yearly sum of 100*l.*," which he charged upon real estate, it was held, that it was meant to be clear of duty. The trustees were, in a subsequent part of the will, directed to deduct the costs, charges, and expenses attending the raising and paying the annuity out of the profits of the land, but though the Court relied on this as confirming the construction adopted, it is evident that it would not alone be sufficient to exempt an annuity from the duty. Alderson, B., said, the word "clear" must mean "clear of all deductions," and the words in the Stamp Act are, that the executor shall "deduct" the duty. Sir J. Leach's doctrine as to the grounds of Lord Eldon's judgment was clearly erroneous. See *Burrowes* v. *Cottrell*, 3 Sim. 376, infra.

Morris v. *Burton.*
"Clear of all deductions."

In *Morris* v. *Burton*, 11 Sim. 161, the direction was to set apart a sum, not more than 7500*l.*, "the dividends of which when invested would amount to or produce the *clear* yearly sum of 300*l.*, *clear of all deductions whatsoever*." There was a provision for supplying any future deficiency of the fund, so that the point in *Sanders* v. *Kiddell* did not arise; and Sir L. Shadwell, V. C., held, that the legacy was given free from duty, and seemed to rely on the presence of the words "clear of all deductions," which did not occur in *Sanders* v. *Kiddell.*]

Foster v. *Ley.*
Bequest for payment of debts.

[In *Foster* v. *Ley*, 2 Scott, 438, a direction by a testatrix, in the first place "to pay off and discharge all and every debt and debts" of her first husband, was held not to imply that the creditors were to take free from duty, although the effect of the decision was that they

were not fully paid. The will contained express directions as to the legacy duty in other places.]

Exemption of *pecuniary* legacies does not extend to stock.

[A bequest of *a sum of* stock in the public funds is not within a direction that the duty on all *pecuniary* legacies shall be paid out of the residue. *Douglas* v. *Congreve*, 1 Keen, 410. But a debt forgiven by the will is a pecuniary legacy within the meaning of such a general direction. *Morris* v. *Livie*, 11 Law J., N. S., Ch., 172.]

Whether legacy given by codicil is included in an exemption in the will.

Where the legacies bequeathed by a will were to be paid free from legacy duty, and the testator by a codicil bequeathed to the husband of one of the legatees, who had died, an equal legacy, "instead of" the legacy given by the will to the deceased wife, it was held by Lord Eldon, affirming a decree of Sir J. Leach, V. C., that the legacy given by the codicil was an independent, distinct, substantive bequest, and therefore was not within the exemption. *Chatteris* v. *Young*, 2 Russ. 183. See *S. C.*, 6 Madd. 30, where the bequests are inaccurately stated. [So, where a testator gave to A. and B. an annuity of 300*l.* equally to be divided between them during their joint lives, *free from all taxes and stamp duties*, and after the death of one of them to the survivor during her life, and after the death of the survivor to C. for his life. By a codicil the testator revoked the annuity of 300*l.*, and gave to A. and B. a *clear* annuity of 100*l.* each with benefit of survivorship. It was held that the gift by the codicil was distinct from the gift by the will, and therefore the annuities were not exempt from the duty. *Burrowes* v. *Cottrell*, 3 Sim. 375. The word *clear* in the codicil should alone have conducted the Court to a different conclusion. *Gude* v. *Mumford*, supra. Where a testator gave a legacy free from duty, and by a codicil revoked it, giving another sum *upon the same trusts*, the latter was held to be exempt. *Cooper* v. *Day*, 3 Meriv. 154. And in *Earl of Shaftesbury* v. *Duke of Marlborough*, 7 Sim. 237, where the testator gave to A. a *clear* annuity of 1000*l.* until he should attain twenty-five, and then an annuity of 2000*l.*, and directed all the legacies and annuities hereby given to be free from duty; and by a codicil revoked the annuities, and gave to A. a clear yearly sum of 3000*l. in lieu thereof;* Sir L. Shadwell, V. C., held the substituted annuity was free of duty, because, being a mere substitution for the gift in the will, it was to be taken with all its accidents. The effect of the word *clear* does not seem to have been noticed. On the same principle it has been held, that, if an annuity is given to A. for her separate use, and by a codicil a further annuity is given "in addition," A. takes the latter for her separate use; see also *Day* v. *Croft*, 4 Beav. 561; *Martin* v. *Drinkwater*, 2 Beav. 215: and if a legacy is given payable out of a

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particular fund, and by a codicil the legacy is revoked, and a smaller legacy given to the same person by words in juxta-position, shewing that it was intended to be substitutional, ("I bequeath to each only 100*l.*"), the substituted legacy is payable only out of the fund named in the will. *Bristow* v. *Bristow*, 5 Beav. 289; see *Leacroft* v. *Maynard*, 1 Ves. jun. 279; *Crowder* v. *Clowes*, 2 Ves. jun. 449. In *Byrne* v. *Currey*, 2 Cr. & M. 603, the testator gave legacies to charitable institutions, "which three charitable legacies I direct to be paid out of my personal estate prior to the payment of my debts and the other legacies thereby given. I direct all my legacies to be paid within two years after my decease, free of any deduction for tax or duty." By a codicil he gave some legacies *raiseable immediately*. It was held, that the exemption from duty in the will applied to legacies generally, and therefore to the legacies given by the codicil.]

Rule when the exemption is directed with reference only to a tenant for life of a specific fund.

[Where a testator bequeathed some specific chattels, and a sum of 100*l.*, to A., and directed his executors to invest in the funds such a sum as would produce 200*l.* a year clear of legacy duty and all other deductions, which annuity was to be paid to A. during her life, and after her decease he bequeathed the principal fund to other parties who, as well as A., were strangers in blood; and he directed his executors, out of the residue of his estate, to pay the legacy duty on the specific and pecuniary legacies and yearly sum by his will given to or in trust for A. It was held, that the executors, having necessarily set apart the fund, in the first instance, free from duty, and paid the duty out of the residue, could not, after A.'s death, call it back from the ulterior legatees. *Calvert* v. *Sebbon*, 2 Keen, 672.]

Domicil.

Stamp laws confined to Great Britain.

Probate duty depends on local situation of the property.

Legacy duty depends on the domicil of the testator or intestate.

[The operation of the stamp acts is confined to Great Britain. Contracts and deeds made abroad will be received in evidence in British courts, although they do not bear the stamps which must have been impressed upon them if they had been executed here. Ante, Vol. 1, p. 733. The probate duty, being the price paid for the assistance of the ecclesiastical court, is regulated by the extent of its jurisdiction, and that depends upon the local situation of the property. The legacy duty (*r*) is a tax imposed upon so much of the personal property of every individual, (whether a British subject or not, *In re Coales*, 7 Mee. & W. 395), who dies domiciled in England, as is disposed of by his will, or is distributed under the statute. The liability to legacy duty, therefore, depends, not upon the actual

Domicil with reference to charges on land.

(*r*) [Legacy duty is also payable upon the produce of real estate, and upon legacies charged on real estate. Whether the liability of such payments to the duty is to be governed by the domicil of the testator is a question of some dificulty, and wholly untouched by authority.

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locality of the property, but upon its locality in the eye of the law, depending (as its name indicates) upon the domicil of the person of the owner. Thus personal property lying in fact in a foreign country but belonging to a person whose domicil at the time of his death was in Great Britain, cannot be dealt with by a representative in this country without payment of the legacy duty; and, on the other hand, if the owner died in a foreign or colonial domicil, his property locally situate in this country, even though administered here, and for the benefit of resident legatees or next of kin, is exempt from the duty. The modern decisions appear to support this proposition in all its generality, and to overrule some earlier authorities to the contrary. The cases, stated in the order of time, are as follow:—

Att.-Gen. v. *Cockerell.*

[In *Att.-Gen.* v. *Cockerell*, 1 Price, 165, it was held, that the duty was payable on legacies bequeathed by a British subject who died domiciled in India, whose property was situate in India at the time of his death, whose executors proved the will there: such legacies having been paid in England to legatees there, out of funds transmitted from India to executors who had proved the testator's will in England. The same point was decided in *Att.-Gen.* v. *Beatson*, 7 Price, 560. See 2 Myl. & Cr. 271; 7 Mee. & W. 395. In *Logan* v. *Fairlie*, 2 Sim. & W. 284, the testator died domiciled in India, all his property being there, and bequeathed the residue of his estate to H. and L. in moities, and if L. should be dead, her children to have her moiety in equal shares. The executor resided in India, proved the will there, and remitted the clear residue to his agent in England, with directions to pay one moiety to H., and the other to L. or her children. L. had died before the testator, and a bill was filed on behalf of her infant children to have the residue secured. Sir J. Leach, V. C., held, that duty was payable on the amount so remitted. His Honor said:—"If a testator die in India, and his personal estate be wholly in India, and his executor be resident there, and the will proved there, and the executor remit to a legatee in England, or to some other person in England, for the specific use of the legatee, the amount of his legacy, I am of opinion that the legacy duty is not payable upon such remittance, inasmuch as the whole estate is administered in India, and the remittance is in respect of a demand which is to be considered as established there. But if a part of the assets of the testator is found in England in the hands of the agent of such executor, without any specific appropriation, and a legatee in England institute a suit here for the payment of his legacy out of such un-

Att.-Gen. v. *Beatson.*

Logan v. *Fairlie.*

Legacy appropriated abroad.

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appropriated assets, then such assets are to be considered as administered in England, and the leagcy duty is payable in respect of them. Now that is the case here." This determination was overruled on the point again rising in the same case, 1 Myl. & Cr. 59, infra, p. 791.]

Hay v. *Fairlie.*

[In *Hay* v. *Fairlie*, 1 Russ. 117, the circumstances were similar to those in the preceeding case, except that the question arose upon a specific legacy invested by the executors in India, for the benefit of A. and her children, the interest only of which had been remitted to England. Lord Clifford, M. R., held, that no duty was payable, on the ground that the legacy had been specifically appropriated in India. "The remittances do not come to this country as a portion of the estate to be administered here under the will of the testator, but as the interest of a sum specifically appropriated in Bengal, to be paid to the use of the person for whom the appropriation has been made."]

Re Ewin.

Legacy duty payable in respect of personal property situate abroad, as foreign funds.

[In *Re Ewin*, 1 Cr. & J. 151, it was held, that personal property situate abroad, (namely, American, Austrian, French, and Russian funds, which funds were transferable and the dividends payable abroad), belonging to a testator who died domiciled in England, being dealt with by the executor in England, subjected him to payment of the duty. Alexander, C. B., said, "It must be construed, I think, that this act, in speaking of legacies, is confined to Great Britain. When persons die in India, whose estates, though the estates of British subjects, are distributed in India, and are delivered over to the several legatees, whether pecuniary or residuary in India, it never has been the practice, nor was it intended, that such estates should be chargeable with the duty. Under these circumstances, though I do not doubt but that the reasons given in *Logan* v. *Fairlie* were satisfactory, and justified under the particular circumstances, it requires such circumstances to bring such legacy and payment within this act. But it can never be doubted that the act was meant to include the estate of a person domiciled in England, a subject of this country, an Englishman whose executors are living in this country." The same point was decided, in respect of property situate in India, in the recent case of *In Re Coales*, 7 Mee. & W. 390, where the executor in England had received the property from an administrator in India. The testator was a British subject, though not so by birth, and was domiciled in England when he died.]

In re Coales.

Re Bruce.

[The converse proposition was decided in *Re Bruce*, 2 Cr. & J. 437, namely, that personal property in this country belonging to a

foreigner, who dies abroad and appoints an English executor, and bequeaths to English legatees, is liable to duty. The Court decided the case on the ground that the testator was not a British subject, or bound by the laws of this country, expressly leaving open the question, whether the decision would have been the same if the testator had been a British subject domiciled abroad.]

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Domicil.
No legacy duty on property in England of a foreigner who died abroad.

[In *Att.-Gen.* v. *Jackson*, 8 Bligh, 15; *S. C.*, nom. *Att.-Gen* v. *Forbes*, 2 Cl. & Fin. 48; *Jackson* v. *Forbes*, 2 Cr. & J. 382; a native of Scotland, domiciled in India, died there, leaving personal property there, but none in England. His executors in India proved his will there, and not in England, paid his debts and pecuniary legacies, converted the residue of his estate into money, which they sent to England to be invested in their names, and two of them subsequently came to England. A suit having been instituted in England to ascertain the rights of the residuary legatees, the fund was transferred to the account of the Accountant-General. It was held by Lord Brougham, C., by the Court of Exchequer, on a case sent from the Court of Chancery to them, and finally by the House of Lords, that no duty was payable in respect of any of the specific or residuary legacies, some of which were given to parties domiciled in Great Britain at the time of the testator's death. The grounds of the decision do not appear.]

Att.-Gen. v. *Jackson.*
Testator's estate and executors in India.

[After the decision of the last-mentioned case in the House of Lords, the question in *Logan* v. *Fairlie* again came before the Court of Chancery, 1 Myl. & Cr. 59; and the decision of Sir J. Leach was overruled, the Lords Commissioners being of opinion, that, under the circumstances, the residue had been appropriated in India. Sir C. Pepys, Lord Commissioner, is reported to have said:—"How it was that the late M. R. came to the conclusion he did upon that state of facts, it is not easy to discover; but he states the rule to be drawn from the cases in precisely the same terms in which it is considered as being now established after *Att.-Gen.* v. *Jackson*, namely, that, if the property be severed from the corpus of the estate, and nothing remains but to pay it to the person whose right had been ascertained, it would then be exempted from the legacy duty; but, if it remained in the hands of the executor unappropriated, and came to be administered in England, the duty would attach upon it. Now, can it be said that there was not an appropriation in India? The letter leaves that beyond all question, and, independently of *Att.-Gen.* v. *Jackson*, there would not be a doubt upon the construction of the act; but, after that case, it is impossible to make it a subject of argument. There property was brought home by the

Logan v. *Fairlie.*
Decision of Sir J. Leach overruled.

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party having the custody of it, *and there was no specific appropriation*, as the accounts which were directed prove, and a great deal remained to be done. The question is, whether *Att.-Gen.* v. *Jackson* has not covered this case. *We think it has covered a great deal more.*" This is not very consistent; and, so far as it seems to recognize the importance of an appropriation in India, has been overruled by the case of *Arnold* v. *Arnold*, 2 Myl. & Cr. 256. There the testator died domiciled in India, where the greater part of his personal estate was situate, having specifically bequeathed his property in England to his wife, and having given pecuniary legacies to his children and other persons, some in England, and some in in India. The Indian executor having proved the will, and paid the testator's Indian debts, transmitted the residue to the executors who had proved the will in England; and it was held, in a suit instituted in England, that no legacy duty was payable in respect of the pecuniary legacies, which the funds were insufficient to pay in full. Lord Cottenham, C., said, that, where the act speaks of "any will of any person," and of legacies being payable out of the personal estate, it must be considered as speaking of persons and wills and personal estates in this country. Probate in this country was immaterial; "the question being, whether, within the meaning of the act of Parliament, the property out of which the legacies are payable be property of a person which passes by the will of that person [who is?] within the meaning of the act." All the estate in England having been specifically bequeathed, the pecuniary legatees were unable to derive any benefit from it by way of contribution to payment of the debts, so that, as to them, the existence of any estate in England at the time of the testator's death was immaterial. But it is obvious that the Court proceeded upon the principle, that the local position of the property formed no element in the question, as was, indeed, decided in *Re Ewin* and *Re Bruce*. All the Indian cases establish also, that the mere fact of the testator being a British subject does not alone render his estate liable. It therefore appears that there is direct authority for every branch of the proposition with which we started,—that the duty is not payable in respect of any property of a testator who was not domiciled in Great Britain at the time of his death, but is payable in respect of all personal property of a testator who was so domiciled, so far as such property comes to the hands or within the power of an executor in this country.]

Arnold v. *Arnold.*

Testator and estate in India, estate administered in England.

Commissioners of Charitable Donations v. *Devereux.*

[In the recent case of *The Commissioners of Charitable Donations* v. *Devereux*, 11 Law J., N. S., Ch., 362, the legacy duty was held

not to be payable under the following circumstances:—A British subject in 1776 settled in France, and obtained letters of naturalization and nobility there. During the revolution he fled to England, and his property in France was confiscated. In 1802 he returned to France, and as a British subject claimed the compensation for his lands. He remained in France until his death in 1806, having, by a will made there, and confirming a will previously made in England, given part of his property, including the expected compensation, to be applied in Ireland to charitable uses. His will was proved in France and in England. In 1820, the expected compensation was awarded by the commissioners, in the form of a sum of French rentes, and transferred in France to an agent for the executor in England, against whom the present bill was filed on behalf of the charity, for an account. The property, therefore, was not locally situate in this country; and it was principally contended, on behalf of the Crown, that an Englishman could not acquire a foreign domicil so as to avoid the legacy duty. But Sir L. Shadwell, V. C., said:—"This case appears to be concluded by the case *In re Bruce*. The question here seems to be, not to whom the party owed allegiance, but where he was domiciled at his death, and there can be no doubt but that he was domiciled in France. His will also was French, and the property to be administered was in its essence and origin French; and though the title to it arises out of British allegiance, that does not affect the question. There is no difficulty whatever in the case; the domicil of the party being French, the will French, and the property French." (See, as to the title to compensations under the stat. 59 Geo. 3, c. 31, founded on the treaty of Paris and the subsequent conventions, *Hill* v. *Reardon*, 2 Russ. 608).]

LEGACY DUTY.

Domicil.

Liability to legacy duty regulated by domicil.

[In *Att.-Gen.* v. *Dunn*, 6 Mee. & W. 511, the first question which arose was, whether in fact the testator, who was a British subject, had lost his English domicil; and it being decided that he had not, it was of course held that duty was payable upon the bequests contained in his will, and the Court expressed no opinion on the legal question which would have arisen if their determination on the matter of fact had been different. But Parke, B., said, that there was great difficulty in reconciling the principles of all the cases; and Alderson, B., even said, that, as then advised, he thought the Crown would have been entitled to the duties in either case.]

Att.-Gen. v. *Dunn.*

Opinion of Alderson, B.

RELEASES.

II. Releases.

1. *Releases by Operation of Law*, 794.
2. *Releases by Deed, their Nature and Operation*, 797.—*Who may make and who may take Advantage of*, 802.—*To what Demands they extend, as to Nature and Date*, 812. *General Words restrained by a Recital*, 817.

Definition of a release.

A release, in the limited sense in which the word is employed in the present title, (which does not embrace the instrument, considered as a deed of *conveyance*), is the giving up or discharging of a right of action which one hath or may claim against another, or the estate of another. 5 Bac. Ab., Gwill. ed., 680.

1. Releases by Operation of Law.

Releases by operation of law.

Creditor making debtor his executor.

An instance of this kind of release occurs, where a creditor appoints his debtor the executor or one of the executors of his will, which, on the acceptance of probate, absolutely extinguishes the debt *at law*, since the debtor would be a necessary party, as plaintiff, in an action against himself; *Dorchester* v. *Webb*, W. Jones, 345; Cro. Car. 372 (*s*); *Wankford* v. *Wankford*, 1 Salk. 299; *Cheetham* v. *Ward*, 1 Bos. & P. 630; see *Bailey's case*, 2 Mod. 315; [and under the old law, the infancy of the testator made no difference. Co. Litt. 264. b. And a debt for which the executor is jointly or jointly and severally bound with others is discharged as completely as if it were his sole debt. Com. Dig. *Adm.* (135); 1 Salk. 300; 1 Bos. & P. 630; 2 Wms. Saund. 47: *Nicholson* v. *Revill*, 4 Ad. & E. 675. But the appointment of an executor of a debtor to be the creditor's executor is no release of the debt. Bac. Ab. *Exors.* (A. 10); Cr. Car. 372. It seems that the debt is discharged before probate by the debtor, and notwithstanding his death without having proved. But whether his renunciation of the probate will make any difference seems to be doubtful. See Butl. Co. Litt. 264. b.; 1 Salk. 301, 307; *Creswick* v. *Woodhead*, 5 Scott, N. R. 778.] The debt being extinguished by this union of the characters of creditor and debtor in the same person, the right of action is not revived by the transfer of the security to a third person, although such security is a negotiable instrument, so that the action would have been brought in the name of the indorsee. If, therefore, the holder of a promissory note appoint the maker one of his executors, the indorse-

(*s*) In this case it was held, that, where A. and B. were jointly and severally bound to C., and A. died, having appointed D. his executrix, and then C. died, having also appointed D. his executrix, D., as executrix of C., might maintain an action on the bond against B.

ment of the note by the co-executors will not enable the indorsee to sustain an action on the note against the maker. *Freakley* v. *Fox*, 9 B. & Cr. 130; 4 M. & Ry. 18. What has been stated, however, applies only to the *legal* remedy; for, *in equity*, the executor of course is accountable to the legatees or next of kin for the money owing from himself, as part of the assets. *Askwith* v. *Chamberlain*, 1 Ch. Rep. 138; *Field* v. *Clerk*, Id. 242; *Casey* v. *Goodinge*, 3 B. C. C. 110; *Errington* v. *Evans*, 2 Dick. 456; *Berry* v. *Fisher*, 11 Ves. 87; [*Simmons* v. *Gutteridge*, 13 Ves. 262. And even at law the executor is bound to answer to the creditors for the amount of the debts as assets in his hands. 1 Salk. 305; Plowd. 186; 1 Roll. Ab. 921.]

As to limited executorships.

In order to avoid the legal discharge, the debtor is sometimes nominated executor *when the debt shall have been paid*, (for our law admits of a qualified executorship of this kind, vide Godolph. 77; Hob. 265; 3 Bac. Abr. 29; *Stapleton* v. *Truelocke*, 3 Leon. 2; *Carte* v. *Carte*, 3 Atk. 180), and in the meantime administration is granted to another; or, if there be a co-executor, he pro tempore (i. e. during the disability of the other) solely fills the office; but the purpose may in general be more conveniently attained by constituting the debtor executor of the general property, *exclusively of the debt*, and then making some other person special executor in respect of this debt; for it is clear that the Ecclesiastical Court will grant probate to one person of one part of the estate, and to another of other part. *Austre* v. *Audley*, 1 Roll. Ab. 914, (S), pl. 4; Wentw. Off. Ex. 12; Godolph. 78; 3 Bac. Ab. 30. But in such a case there is only one probate, for all the individuals among whom the office is parcelled out make in law but one executor. Wentw. Off. Ex. 13. But if there is a co-executor, of course the expedient of constituting a special and limited executor is not required, as whatever portion of the goods one executor is excluded from vests wholly in the other, who is sole executor pro tanto. [When the debtor is appointed administrator, the remedy merely for the debt is suspended. 8 Rep. 136; 1 Salk. 303, 306; *Hudson* v. *Hudson*, 1 Atk. 461. And it has been held that a debtor is not released by being appointed executor durante minore ætate of another. 1 Lord Raym. 605.]

Debtor making creditor his executor.

In cases the converse of the above, i. e. where a debtor appoints his creditor the executor, or one of the executors, of his will, a similar effect, of course, is produced; for here also, as the creditor becomes debtor to himself, the right of action is necessarily gone; but it is always in the power of the nominee to prevent this consequence, by renouncing the executorship; *Dorchester* v. *Webb*, Cr.

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Car. 372; W. Jones, 345; or, which is now held to be sufficient, by declining to prove the will and act. *Rawlinson* v. *Shaw*, 3 T. R. 557. See also 1 Selw. N. P. 562. ["If the obligor make the obligee, or the executor of the obligee, his executor, this alone is no extinguishment, though there be the same hand to receive and pay; but if the executor has assets of the obligor, it is an extinguishment, because then it is within the rule that the person who is to receive the money is the person who ought to pay it; but if he has no assets, then he is not the person that ought to pay, though he is the person that is to receive; and to this purpose is 11 Hen. 4, c. 83, and *Dorchester* v. *Webb*, 1 Cro. Car. 372; W. Jones, 345. Where the obligee makes the executor of one of the obligors his executor, who has no assets, this is no discharge of the debt; because, though the executor, as executor of the obligee, is the person to receive, yet, having no assets of the obligor, he is not the person who ought to pay. But if the executor of the obligee is made executor to one of the obligors, and has assets of the obligor, the debt is extinct, and the executor cannot sue the other obligor, *for the having assets amounts to payment.*" Per Holt, C. J., 1 Salk. 305. So, if the executor, being a specialty-creditor, has no assets, he may sue the heir. Id. 304; 2 Shaw, 401; Plowd. 185; Butl. Co. Litt. 264. b., n. And a creditor who administers, if he has no assets, may sue an executor de son tort. 1 Roll. Ab. 940, pl. 5.]

Executor's right of retainer.

[After what has been said, it is almost superfluous to remark, that an executor has a right to retain out of the assets the amount of the debt due to him, either beneficially or as trustee, as against creditors of equal degree, but not as against creditors of higher degree. Plowd. 184; *Plumer* v. *Marchant*, Burr. 1380; see *Burge* v. *Brutton*, 2 Hare, 373; and that notwithstanding payment of the assets into Court in an administration suit. *Chissum* v. *Dewes*, 5 Russ. 29; *Langton* v. *Higgs*, 5 Sim. 228. But this right does not extend to equitable assets. *Bailey* v. *Ploughman*, Mosel. 95; *Chambers* v. *Harcourt*, Id. 123; *Hopton* v. *Dryden*, Prec. Ch. 181. However, it has been held, that an executor may retain a debt due to another in trust for himself. *Cockcroft* v. *Black*, 2 P. Wms. 298; *Franks* v. *Cooper*, 4 Ves. 763; *Loomes* v. *Stotherd*, 1 Sim. & St. 461. See *Loan* v. *Casey*, W. Bl. 965; *De Tasket* v. *Shaw*, 1 B. & Al. 619; *Kent* v. *Pickering*, 2 Keen, 1.]

Marriage of debtor and creditor.

Another instance of a release by operation of law is, where a woman marries her creditor or debtor, which absolutely extinguishes the debt; Co. Litt. 264. b.; but a bond given to a woman, in contemplation of her marrying the obligor, conditioned to pay a sum of

money to her or her representatives, after the obligor's death, has been held not to fall under this rule; for, as the bond is not payable until after the determination of the coverture, such coverture works no extinguishment of the debt. *Gage* v. *Acton*, 1 Lord Raym. 515; *Milbourn* v. *Ewart*, 5 T. R. 381. [The marriage of the executrix of the creditor with the debtor operates merely to suspend the remedy; 8 Rep. 136; 1 Leon. 320; 1 Salk. 306.

2. As to Releases by Deed.

Releases by deed.

1. *What amounts to a Release.*]—The proper words of a release, according to Littleton, are *remise*, *release*, and *quiet* (now abbreviated into *qait*) *claim* (*t*), to which Sir E. Coke has added *renounce* and *acquit*. Co. Litt. 264. b. Any expressions, however, which denote the intention of the one party to discharge the other, are sufficient; and therefore, where, by an instrument under seal, "concluded and agreed" between A. and B., A. did acknowledge himself fully satisfied and discharged of all bonds, debts, or demands whatsoever, from the beginning of the world to the present day, by the said B., it was resolved that this acknowledgment by deed of being satisfied was, in judgment of law, a good release. *Hickmott's case*, 9 Rep. 52 b. So, it has been held, that a pardon by act of Parliament of all debts and judgments amounts to a release of the debt, the word "pardon" including a release. *Lock* v. *Etherington*, 1 Sid. 265. If a man releases to another all actions, without saying "which he hath against him," the latter words, of course, would be supplied, being necessary to the sense. Touch. 344.

What words make a release.

Covenant not to sue, when a release.

A covenant never to sue amounts, in construction of law, to an absolute release of the covenantee; for the law, which abhors a multiplicity of suits, by this rule attains a result which without it could only be reached by the circuity of two actions. [*Hodges* v. *Smith*, Cro. El. 623; *Smith* v. *Mapleback*, 1 T. R. 446; *Burgh* v. *Preston*, 8 T. R. 486. But, as the avoiding of circuity is the sole ground of this rule, it does not apply to a covenant not to sue by one of several partners or joint obligees. *Walmesley* v. *Cooper*, 11 Ad. & El. 216; 3 Per. & D. 149, infra, p. 811. See *Hawkshaw* v. *Parkins*, 2 Swanst. 544.] And a covenant not to sue *for a definite period* is no release; *Lacy* v. *Kynaston*, 1 Lord Raym. 690; 2 Salk. 575; Carth. 63; 1 Lord Raym. 690: *Carvell* v. *Edwards*, Carth. 211; Holt, 546; 1 Show. 330; (see also *Ayloffe* v. *Scrimshawe*, 2 Salk. 573; Carth. 63; 1 Show. 46; Comb. 123; *Deux* v. *Deve-*

(*t*) ["Quietum clamare," to cry quiet; "quieta clamantia."]

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reux, Cr. El. 352); and therefore cannot be pleaded in bar to an action even within the prescribed period, unless the deed contain an express provision to this effect. *Dowse* v. *Jeffreys,* 1 Roll. Ab. 939, (L), pl. 1; Id. pl. 2; *S. C.,* nom. *Deux* v. *Jefferies,* Cr. El. 352; [*Thimbleby* v. *Barron,* 3 Mee. & W. 210. Of course, a provision that the agreement not to sue may be pleaded in bar to any action will be inoperative, unless the instrument in which it is contained is under seal; *Lowe* v. *Egington,* 7 Price, 604; and, according to some early authorities, the executors or administrators are not bound unless they are named. *Carvell* v. *Edwards,* 1 Show. 330; Holt, 546.]

Whether right of action suspended by provision in assignment in trust for sale.

In *Lancaster* v. *Harrison,* 4 Moo. & P. 561, the question was raised, whether the plaintiff's right to recover the amount of certain bills which he had discounted for A., for whose accommodation the defendant had become party to the bills as drawer, was suspended by a deed of assignment, by which A., with the concurrence of both the plaintiff and defendant, had assigned a leasehold dwelling-house and other effects to a trustee, in trust for sale, and to apply the proceeds in paying the bills in question; and which provided that the premises should be sold or offered for sale, and the produce thereof, if sold, applied for the purposes specified in the deed, before any proceedings should be commenced against A., to compel payment of the bills; *and that no proceedings should be had on them, unless no person should be willing to purchase, or the produce should be insufficient.* A. became bankrupt; his assignees sold the lease for 10*l.*, which they paid to the plaintiffs, who brought the present action against the drawer for the amount of the bills, less the 10*l.* It was contended, for the defendant, that, by the terms of the deed, the plaintiff was precluded from bringing an action until the trustee for sale had sold or attempted to sell the property, which had not been done. But the Court held, that the plaintiff was entitled to recover. (See *Twopenny* v. *Young,* 3 B. & Cr. 308, ante, Vol. 3, p. 301). "If we take this proviso according to the letter," said Tindal, C. J., "it has in fact been complied with. It seems, the premises have been put up to sale. But it is argued that a sale by the assignees of A. was not the kind of sale contemplated by the proviso, and that it should have been a sale by the trustee named in the deed, for the purposes mentioned in the deed. It seems to me, however, that this affords only a ground of complaint against the trustee; it is a mere non-execution of the trust by him; but it clearly is no answer, in point of law, to an action brought upon the bills. Upon the whole, it seems to me, that, if there be any remedy for

the defendant under this deed, it must be by application to the Court of Chancery, either against the trustee, or to injoin the plaintiffs from suing on the bills." Bosanquet expressed himself in terms which would seem to imply an opinion that a covenant not to sue for a definite period proprio vigore suspended the right of action; but it is probable that the learned judge did not mean to deny the necessity of an express provision to produce this effect, as such a denial would place him in opposition to the early authorities establishing the long-recognized distinction above noticed.

Contemporaneous instrument operates as a defeazance, where.

Burgh v. *Preston.*

An engagement not to sue for a definite period, if executed contemporaneously with, and indorsed upon, the instrument creating the obligation, will, it seems, be considered as a component part of such instrument, which will receive a qualified construction accordingly. Thus, in *Burgh* v. *Preston*, 3 T. R. 483, where it appearing that, previously to the execution of a common money bond, the following memorandum had been indorsed on it:—"The before-named A. (obligee) hath given an undertaking not to bring any action or suit upon the before-written bond, or assign the same, until after the death of the said B., (obligor);" it was held, that this memorandum was to be considered as qualifying the condition. Lord Kenyon, C. J., observed, that this was not like the case of a collateral agreement in a different deed not to sue, in which the Courts have said that the party must resort to his agreement, and cannot plead it as a release, for here the memorandum was annexed to and subscribed before the execution of the bond. This decision was principally founded upon *Broke* v. *Smith*, Moor, 679, pl. 930, where, in an action of debt upon a bond, the condition of which was to save harmless certain land from all incumbrances created by the obligor, it was held, that an indorsed memorandum, declaring that the condition should not extend to a certain statute acknowledged by the obligor, was to be taken as part of the condition. See also *Ex p. Henecy*, cit. 1 Sch. & Lef. 46; *Reed* v. *Morris*, 2 Myl. & Cr. 361.

Effect of a covenant not to require interest on a bond during the life of the obligor.

Morley v. *Frear.*

In *Morley* v. *Frear*, 4 Moo. & P. 305, the question, as to the effect of a qualified covenant by the obligee of a bond not to sue, was much considered. The defendant gave to the plaintiff the bond in question, which was conditioned for the payment of 1000*l.*, and the plaintiff executed a deed-poll, of even date, whereby, after reciting that the plaintiff would become entitled by virtue of the deed of settlement, executed on a former marriage of his then wife, on the decease of the defendant, (her father), to 750*l.*, which the defendant had covenanted to pay at his decease, and that the defendant had given a bond to the plaintiff for 1000*l.*, (the bond declared on), and

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that it had been agreed that the plaintiff and his wife should release all their interest in the said sum of 750*l.*, and that the plaintiff should not receive interest on the said sum of 1000*l.* during the defendant's life, notwithstanding the bond, *and that, if the bond should happen to be assigned by the plaintiff, and the defendant should have to pay the interest thereof*, the plaintiff would make good the same; the plaintiff and his wife absolutely released unto the defendant the said sum of 750*l.*; and the plaintiff covenanted that he would not require payment of the 1000*l.* secured by the bond, nor claim interest for the same during the life of the defendant; and that, in case the bond should be assigned by the plaintiff, and the defendant should be required by the assignee to pay the principal, the plaintiff would pay the defendant interest for the same during the defendant's life. The plaintiff assigned the bond, and the present action was brought by the assignee. It was contended that the deed-poll operated as a defeazance of the bond, but the Court decided that the present action was well brought. Tindal, C. J., observed :—"There is a marked distinction between two parts of the deed-poll, which it is impossible to overlook; the one, consisting of a release of a deed, by which the defendant covenanted to pay 750*l.* after his death; and the other, a covenant by the plaintiff not to sue or require payment of the 1000*l.*, secured by the substituted bond, during the life of the defendant. There are, undoubtedly, many cases in which a covenant not to sue may, if such be the intention of the parties, operate as a release, as in *Lacy* v. *Kynaston*, where Holt, C. J., in delivering the judgment of the Court, said, (1 Ld. Raym. 690, 2 Salk. 575), 'It was objected, that a perpetual covenant never to take advantage of a covenant, &c., is a release. The Court agreed to it for avoiding circuity of action :—as, if A. be bound to B. in a bond, &c., B. covenants never to sue A. upon this bond; this will be a bar in debt brought upon the bond, because B. has bound himself against all the remedy that he might have upon the bond. But if A. and B. be jointly and severally bound to C., and C. covenants never to sue A., this is no defeazance, because he has a remedy against B., but A. will have only covenant,' &c. Now, it is necessary, in this case, to look at the relative situations of the parties at the time the deed-poll was executed, in order to ascertain whether it was their intention that it should operate as a defeazance or as a release. It certainly operates as a release of the plaintiff's claim on the defendant for 750*l.*, being the portion the plaintiff was entitled to receive in right of his wife after the defendant's death; but the bond for 1000*l.* was given in

lieu of that sum; and, by the deed-poll, the plaintiff merely covenants that he should not require payment of that sum, nor claim any interest for the same during the life of the defendant; and that, in case the plaintiff should assign the bond to any person, and the defendant should be required by the assignee to pay the principal, then, that the plaintiff would pay the defendant interest for the same during the term of his life. The plaintiff, therefore, only covenanted that he himself would not require or demand payment of the principal or interest during the life of the defendant; but the introduction of that exception or proviso, that in case the plaintiff should assign the bond, and the defendant should be required by the assignee to pay the principal, shews that the parties contemplated that the plaintiff might raise money on the bond, and assign it to another, who might sue the defendant for the principal; and in case of his recovering, the plaintiff was to pay the interest on the sum recovered during the life of the defendant. The parties meant that the plaintiff should stand in the same situation as he did before the bond was executed; and if it had not been given, the plaintiff might have assigned his interest in the sum of 750*l.*, which he would be entitled to receive on the death of the defendant. If, indeed, the defendant had reason to suppose that the assignment of the bond was fraudulent, or that the action was brought to enable the plaintiff to recover for himself, he might have pleaded the fraud."

[Acceptance of an assignment of property in trust for sale, with a provision that no sale shall be made without giving six months' notice, does not imply an undertaking not to sue in the meantime. *Emes* v. *Widdowson*, 4 Car. & P. 151; see *Good* v. *Cheesman*, 2 B. & Ad. 338; *Lewis* v. *Jones*, 4 B. & Cr. 506.]

Release must be under seal.

A release must be under seal. In *Rogers* v. *Payne*, 1 Wils. 376, in an action of covenant for non-payment of a sum of money, the defendant having pleaded a discharge in the nature of a release without deed, the plea was held on demurrer to be ill, on the ground that a covenant to pay money, which is by deed, could not be discharged without deed. See also *Neal* v. *Sheffield*, Cr. Jac. 254; *Blake's case*, 6 Rep. 44; *Mease* v. *Mease*, Cowp. 47 (*u*); *Kaye* v.

(*u*) As to the doctrine that a deed cannot be varied by a parol agreement, vide *Thompson* v. *Brown*, 1 J. B. Moore, 358; *Sellers* v. *Beckford*, Id. 460; *Cordwent* v. *Hunt*, 2 J. B. Moore, 660; [*Brooks* v. *Nash*, 9 Ad. & El. 854; *Bailey* v. *Homan*, 5 Scott, 94; *Harris* v. *Goodwyn*, 2 Scott, N. R. 459; *Harris* v. *Blakeway*, 3 Scott, N. R., 199; overruling *Hotham* v. *E. I. Company*, 1 Doug. 272; ante, Vol. 1, pp. 348, 408; Vol. 4, p. 390. In equity, of course, an unsealed

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Waghorn, 1 Taunt. 428; *Reeves* v. *Brymer*, 6 Ves. 516 (*x*); *Thomas* v. *Courtnay*, 1 B. & Al. 1. And though an executory parol agreement may be discharged by parol, yet a cause of action, which has actually accrued even under such an agreement, cannot be so released, but requires a deed: *Langdon* v. *Stokes*, Cr. Car. 383; see also *Hurford* v. *Pile*, Cr. Jac. 483; *Treswaller* v. *Keyne*, Id. 620: unless it admit of the plea of accord and satisfaction. [*Willoughby* v. *Backhouse*, 4 D. & Ry. 539; 2 B. & Cr. 821; *Baylis* v. *Usher*, 4 Moo. & P. 791; ante, Vol. 1, p. 408; Vol. 2, p. 646, Vol. 3, p. 682. A judgment may be released by deed. *Barker* v. *St. Quentin*, 13 Law J., N. S., 144, Exch.] In pleading a release in equity, it is sufficient to state that it was "sealed and delivered," without also expressing it to have been *signed*. *Taunton* v. *Pepler*, 6 Madd. 166. [But an obligation may be released by an intentional cancelling of the deed by the party interested in it. *Perres* v. *Bishop*, Dy. 112, a; *Argoll* v. *Cherry*, Palm. 403; *Harman* v. *Owen*, 1 Atk. 520; ante, Vol. 3, p. 285.

Who may make releases.

As to releases by husband, partners, executors, and administrators;

2. *Who competent to make, and who may take Advantage of Releases.*]—A man of course may release a sum of money owing to his wife while sole; *Woodward* v. *Darcy*, Plow. 184; *Miles* v. *Williams*, 1 P. W. 253; see also 1 Lord Raym. 520; as may one of several partners in trade, a debt owing to the firm; (ante, Vol. 7, p. 42); (although a covenant not to sue by one of them will not operate as a release, ante, p. 797); the power of release being in both these instances incidental to the power to receive, which is possessed by the husband and partner. So, one of several executors is competent to release a debt owing to them in that character, each having an entire interest in, and authority over, the property; Dyer, 23 b; and to sign the certificate of a bankrupt. *Powell* v.

agreement, varying the terms of a deed, may be binding. *Norton* v. *Wood*, 1 Russ. & M. 178, where an injunction was granted upon an unsealed agreement, not to sue upon a bond during four years, in case the interest should be regularly paid; notwithstanding the interest had once or twice been paid one or two days after the time; the obligee being concluded by acceptance from taking advantage of such irregularity. A power of attorney given by deed may be revoked without deed. *Rex* v. *Wait*, 11 Price, 108.]

(*x*) In this case parol declarations by a testator, that he did not intend to call for a bond debt owing by a legatee, was held to be inoperative to release the obligor. See also *Weckett* v. *Raby*, 2 Br. P. C. 386; *Aston* v. *Pye*, 5 Ves. 350, 354; *Eden* v. *Smyth*, Id. 341. In *Gilbert* v. *Wetherell*, 2 Sim. & St. 254, a debt owing on a promissory note was held to be released by the destruction of the notes by the direction and in the presence of the creditor, then on his death-bed. [See *Flower* v. *Marten*, 2 Myl. & Cr. 459; *Leche* v. *Lord Kilmorey*, Turn. & R. 207; *Warwick* v. *Rogers*, 6 Scott, N. R. 1.]

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Evans, 5 Ves. 844. But, if there be two executors, and one of them refuse to join in the action, upon which he is severed, he cannot, after such severance and judgment recovered, acknowledge satisfaction. Dyer, 319 b. It seems, that one of several administrators may release a debt due to the intestate; and the opinion expressed by Lord Hardwicke to the contrary, in the case of *Hudson* v. *Hudson*, 5 Bac. Ab. 700, must be referred to special circumstances. See *Williams* v. *Pen*, 5 Bac. Ab. 700; S. C. nom. *Willand* v. *Fen*, Selw. N. P. 767, 6th ed.; *Jacomb* v. *Harwood*, 2 Ves. sen. 267. [*Stanley* v. *Barnes*, 1 Hagg. 222. Where an insurance office required an executor of the insured, who was beneficially entitled to the policy in his own right by reason of certain transactions with his testator, to sign a receipt as executor, it was held that this did not entitle the creditors of the deceased to charge the executor with the amount as assets. *Glaholme* v. *Rountree*, 1 Jur. 284.]

[The lessor of the plaintiff, in an action of ejectment, cannot release the action. *Doe* d. *Byne* v. *Brewer*, 4 Mau. & S. 300.]

—joint obligee; one of several plaintiffs;

One of several joint obligees may release the obligation. Ante, Vol. 3, p. 273. So, generally, one of several co-plaintiffs may release the cause of action; *Arton* v. *Booth*, 4 J. B. Moore, 194; *Furnival* v. *Weston*, 7 J. B. Moore, 356; though the plaintiffs be trustees; *Bayley* v. *Loyd*, 7 Mod. 250; 1 Selw. N. P. 560: [see *Gibson* v. *Winter*, 5 B. & Ad. 96; *Wilkinson* v. *Lindo*, 7 Mee. & W. 81]; but, if this power be exercised fraudulently, the Court will set aside the release. *Jones* v. *Herbert*, 7 Taunt. 421; *Mountstephen* v. *Brooke*, 1 Chitty's Rep. 390; see also *Legh* v. *Legh*, 1 Bos. & P. 447; *Payne* v. *Rogers*, Id., n.; Doug. 407; infra, p. 804.

—obligee after assignment;

In *Bower* v. *Swadlin*, 1 Atk. 294, Lord Hardwicke doubted whether an obligee could release a bond after assignment. It is now clear, that even at law, after an assignment of a debt of which the debtor has notice, he (the debtor) cannot accept a release from the assignor; for the act being evidently against good faith, the Court would set aside a plea founded on such a release. *Legh* v. *Legh*, 1 Bos. & P. 447; *Craib* v. *D'Aeth*, Id., n.; 7 T. R. 670, n.

—of covenant running with the land,

Where a covenant runs with land, and the covenantee has assigned the land, it should seem that the covenantee cannot subsequently release the covenant, as the assignment has vested the entire benefit of the covenant in the assignee. See *Roe* d. *Bamford* v. *Hayley*, 12 East, 468. But, in *Middlemore* v. *Goodall*, Cr. Car. 503, it seems to have been thought that the doctrine was confined to a release after an action brought by the assignee, and that the covenantee might, before any breach or before the suit com-

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menced, release the cause of action, *though the breach were posterior to the assignment;* but the case did not raise the point, as the release was given pending the suit by the assignee, and therefore was clearly void. The reason for such a distinction is not very apparent.

Release by trustee plaintiff, vacated at law for fraud.

In *Manning* v. *Cox*, 7 J. B. Moore, 617, a general release by a trustee plaintiff was set aside at law under the following circumstances:—Leasehold property had been bequeathed to the plaintiff, in trust to receive the rents for the benefit of the testator's children, with power to lease, which power he exercised by granting a lease to the defendants. The trustee having misapplied the rents, a bill in equity was filed against him at the suit of one of the parties beneficially interested under the will, and a receiver was appointed, who sued the lessees in the name of the trustee for non-payment of rent: the defendants pleaded a release executed to them by the trustee, (who had absconded), pending the suit: the Court ordered the plea to be set aside, and the release delivered up to be cancelled.

[In *Phillips* v. *Clagett*, 11 Mee. & W. 93, Parke, B., said, "The cases cited clearly establish, that the Court may exercise an equitable jurisdiction for the purpose of preventing the defendant from pleading pleas of release, where the release is valid in point of law, but invalid in equity, as being a fraud for which the defendant is answerable. The courts have, in numerous cases which have been cited, properly exercised that jurisdiction by setting aside the plea of a release. It seems, in some of the cases, they have done more than that, for they have set aside the release itself. I apprehend that to have been per incuriam; for I cannot understand what authority the Court has to do that,—all they can do is not to allow the release to be pleaded. If such a release is a fraud in point of law upon one of the parties to it, the Court would not interfere: *that* is the proper subject of a replication; they can only interfere where it is a fraud upon third persons, and where a court of equity would clearly set aside the release, not merely as between the parties, one of whom releases, but where they would set it aside as against the defendant. In order to call upon the Court to exercise its equitable jurisdiction, it must be made out manifestly and clearly that there has been a fraud by some person upon the plaintiff seeking to enforce the demand, and that the defendant was a party to that fraud." See the cases cited supra, and *Hickey* v. *Burt*, 7 Taunt. 48; *Innell* v. *Newman*, 4 B. & Al. 419; *Barker* v. *Richardson*, 1 You. & J. 362; *Herbert* v. *Pigott*, 2 Cr. & Mer. 384; *Johnson* v. *Holds-*

worth, 4 Dowl. P. C. 63; *Crook* v. *Stephens*, 7 Scott, 848; *Wild* v. *Williams*, 6 Mee. & W. 490.]

Releases, when vacated in equity.

In a court of equity, releases are frequently set aside on the ground that they have been extorted by fraud, or extended to matters not contemplated by the releasor, or have been obtained from persons who, at the time, were not conusant of their rights. *Bantrey* v. *Ibson*, 1 Ch. Cas. 46; Freem. 179; *Gee* v. *Spencer*, 1 Vern. 32; *Broderick* v. *Broderick*, 1 P. Wms. 239; *Pascoe* v. *Pascoe*, 2 Cox, 109. An instance of relief on the ground of fraud occurred in *Monger* v. *Kett*, 12 Mod. 558, where the Court relieved against a release which had been obtained by a solvent debtor upon a false representation of insolvency. In *Farewell* v. *Coker*, cited 2 Mer. 353, a lady, having the reversion in fee in lands under a general devise in her father's will, executed to her brother, who was tenant in tail, a general release of all the manors, &c., whereof her grandfather, father, and brother, or any or either of them, were seised in the county of D., and all the estate, right, title, interest, property, claim, and demand of her releasor, in or to the same, by virtue of her said father's will, or otherwise: she now claimed to set aside this release, alleging that it was not intended to pass the legal interest in the reversion, but merely to discharge her brother's estates from a portion to which she was entitled under an antecedent settlement. Lord King, though he at first thought that it sufficiently appeared that the release was executed for a particular purpose, on a re-hearing, altered his decree, directing two issues to be tried; *first*, whether the releasor was apprized of her title to the reversion; and, *secondly*, whether she intended to pass it. The plaintiffs, objecting to Lord King's alteration in his decree, appealed to the House of Lords, who dismissed the bill.

In *Ramsden* v. *Hylton*, 2 Ves. sen. 305, a general release executed by a lady to her brother, of all claims and demands by reason of the will of their mother, or of their deceased brother's or father's personal estate, or of the leases of certain collieries, *or for or by reason of any other matter or thing* except a certain bond therein recited, was held not to discharge the sister's claim to a portion under a settlement executed by their father on his marriage, of the existence of which both the releasor and releasee were ignorant. See *Cole* v. *Gibson*, 1 Ves. sen. 507.

[" In the absence of fraud, or abused confidence, or pressure, every item in an account, of which the parties were fully cognizant at the time they settled it, may be considered as the subject of agreement between them, which they are no more at liberty to repudiate than

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Opening accounts in equity.

any other contract or undertaking into which they may deliberately have entered. A plaintiff, asking to open an account on proving errors in it, should be prepared, not only to prove the fact of error, but to meet any case set up by the defendant of his having settled the account with a knowledge of the circumstances constituting such alleged error." Per Lord Cottenham, C., *Maund* v. *Allies*, 5 Jurist, 851. See *Darthez* v. *Lee*, 2 You. & C. 5; *Davies* v. *Spurling*, 1 Russ. & M. 64.]

Though the Court will not disturb an arrangement intended as a compromise of doubtful rights, especially between the members of a family, because the parties had mistaken notions of those rights, it will not permit a release to stand which has been obtained without a full and honest disclosure to the releasor of all the circumstances in the releasee's knowledge, affecting his (the releasor's) actual situation. *Salkeld* v. *Vernon*, 1 Eden, 64; *Harvey* v. *Cooke*, 4 Russ. 34. See also *Cann* v. *Cann*, 1 P. W. 728; *Cole* v. *Gibson*, 1 Ves. sen. 506; *Gordon* v. *Gordon*, 3 Swanst. 400; *Rothschild* v. *Brookman*, 2 Dow. & Cl. 188; *Portlock* v. *Gardner*, 1 Hare, 595; *Wedderburn* v. *Wedderburn*, 4 Myl. & Cr. 41; *Oldaker* v. *Lavender*, 6 Sim. 239; *Clifton* v. *Cockburn*, 3 Myl. & K. 76; *Pickering* v. *Pickering*, 2 Beav. 31; 4 Myl. & Cr. 289; *Stewart* v. *Stewart*, 6 Cl. & Fin. 911; *Montmorency* v. *Devereux*, 7 Cl. & Fin. 188; *Persse* v. *Persse*, Id. 279; *Scott* v. *Milne*, 5 Beav. 215; *Lawless* v. *Mansfield*, 1 Dru. & W. 557; *Hore* v. *Becher*, 6 Jur. 93. As to taxing a solicitor's bill after payment, see *Horlock* v. *Smith*, 2 Myl. & Cr. 495; *Massie* v. *Drake*, 4 Beav. 433; *Edwards* v. *Meyrick*, 2 Hare, 60.]

Release no bar in equity to a suit.

Of course, a release is no answer to a suit in equity impeaching accounts and transactions to which it professes to extend; and as the charges of the bill, by affecting the consideration for, impliedly deny the validity of, the release, it is not necessary to make any distinct averment of its validity. Lord Clare, indeed, in one instance, held a general release to be a good plea to a bill charging error, fraud, and oppression, in regard to certain accounts and transactions between the parties; but his order was reversed by Lord Redesdale; which reversal was affirmed by the House of Lords, after an able exposition by his Lordship of the principles on which his order of reversal had proceeded. *Roche* v. *Morgell*, 2 Sch. & Lef. 721. See also *Salkeld* v. *Science*, 2 Ves. sen. 107; [*Phelps* v. *Sproule*, 1 Myl. & K. 231; *Foley* v. *Hill*, 3 Myl. & Cr. 475; *Lloyd* v. *Smith*, 1 Anstr. 258; *Parker* v. *Alcock*, 1 You. & J. 432; *Kinsman* v. *Barker*, 14 Ves. 579; *Newman* v. *Hutton*, 3 Beav. 114; *Brown* v. *Perkins*, 1 Hare, 564.]

Stranger to a deed cannot sustain an action on it.

On the general principle, that a stranger to a deed cannot take the benefit of it, covenants in an indenture entered into with persons who are *not parties* confer *no* right of action on such persons; and where a deed is expressed to be made between parties, the persons so named alone are parties to the instrument.

Covenantee must be a party.

Thus, where an indenture of charter-party was made between A. and others, owners of a ship called E., whereof B. was master, of the one part, and C. of the other part; in which indenture A. covenanted with C. and B., and C. covenanted with A. and B., and the conclusion of the indenture was as follows: "In witness whereof the said parties have put their hands and seals;" it was held, that, though B. had executed the indenture, yet, not being a party to it, he could not release an action brought upon the indenture by A., for that this was an indenture reciprocally made between parties of the one part and parties of the other part; in which case no obligation, covenant, or grant could be made with any person who is not a party to the deed. But, where the indenture is not mutual, but is without the words "between &c., as to all persons, &c.," there an obligation, covenant, or grant can be made to other persons. 2 Roll. Ab. 22, (F), pl. 1. See also *Scudamore* v. *Vanderstene*, 2 Inst. 673.

Covenant cannot be made with a stranger.

So, in *Cooker* v. *Child*, cited 3 Lev. 139, where an action was brought upon an indented charter-party, which witnessed that A., master and part owner, with the consent of B., the other part owner, let the ship to C. for such a voyage, and C. covenanted with A., and also with B., to pay 300*l*., B. brought an action upon this covenant, to which C. pleaded, that only himself and A. were parties to the indenture; and this plea was held good on demurrer, by Hale and all the rest of the Court, on the ground that a covenant in an indenture could not be made with a stranger.

Again, in *Offly* v. *Ward*, cited 3 Lev. 140, where, to an action of debt by A. upon a single bill made to A. by the defendant, to the use of A. and B., the defendant pleaded a release by B., it was adjudged to be no bar, for he, being a stranger to the bill, could not release it, though it was made to his use (*y*).

So, in *Gilby* v. *Copley*, 3 Lev. 138, where articles of agreement under seal were made between A., on behalf of B. (the plaintiff) and others, of the one part, and L., (the defendant), of the other part; by which A. covenanted that the defendant should enjoy a certain close for eight years at a stated rent; and the instrument also recited, that A. had sold to the defendant four hundred and forty-eight

(*y*) As to parol promises to the use of a third person, see 3 B. & P. 149, n.

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sheep belonging to B., as executrix of her father; and the defendant then promised (without saying to whom) to pay to B. 210*l.* for the sheep, on the 16th of June then following: B. brought an action on this promise. The defendant demurred, alleging that the action ought to have been brought in the name of A., the plaintiff being no party, and therefore incompetent to sue for or release any benefit under the articles, as she might have done if it had been by way of deed-poll, or not between parties. Three of the justices, however, (Jones, Charlton, and Windham), thought that the action would lie, the deed being made for the benefit of B., and not by indenture, and therefore not working an estoppel; but Levins, J., said, that the indenting or not indenting was not material, but party or no party was the question; it was common learning, that one who was not a party to a deed made between parties could not take by the deed, unless by way of remainder. The argument, however, was adjourned, and the case appears never to have been decided. In a more recent case, (*Ex parte Richardson*, 14 Ves. 187), Lord Eldon was clearly of opinion, that a covenant made with a party to the deed, for the use of another not a party, could not be considered as a covenant with the latter. [*Bushell* v. *Beavan*, 4 Moo. & Sc. 658.]

Action by several partners, one of whom executed a composition deed, bad.

And in further accordance with this rule, the Court of King's Bench, in *Metcalfe* v. *Rycroft*, 6 Mau. & S. 75, decided that an action of covenant could not be maintained in the joint names of several partners, one of whom had executed a composition deed with a debtor of the firm, the indenture being made in the usual manner, between the debtor, of the one part, and the creditors, whose names and seals were set and subscribed, of the other part; and therefore, though the covenant was made in express terms with the executing creditors and their partners, and though the partner signed in the name of the firm, it was held, that the non-executing partner, being no party, ought not to have been joined in the action.

The principle in question was again recognized in *Doe* d. *Bedford* v. *White*, 12 J. B. Moore, 526, where it was admitted by more than one of the learned judges, that a right of re-entry in a lease could not be reserved to a person who was not a party to the deed. And in *Gardner* v. *Lachlan*, 8 Sim. 126; (4 Myl. & Cr. 129), Sir L. Shadwell stated the distinction between a deed-poll and an indenture between parties with great clearness. "A deed-poll," said his Honor, "may be so constructed as to give a person a right of action against the party who executed it; but where there is a deed between parties, I have always understood it to be the settled rule, that no person can bring an action on it, except a party, or those who claim through

him." See also *Berkeley* v. *Hardy*, 8 D. & R. 702; 5 B. & Cr. 355; ante, Vol. 4, p. 257; *Lord Southampton* v. *Brown*, 6 B. & Cr. 718; *Barford* v. *Stuckey*, 5 J. B. Moore, 22; 8 J. B. Moore, 88; 2 Br. & B. 333: *Ex p. Richardson*, 14 Ves. 187; *Colyear* v. *Mulgrave*, 2 Keen, 81.

Covenantor bound, though not a party. *Salter* v. *Kidgley*.

But the rule in question applies only to the covenantee, and not to the covenantor; for a person will be *bound* by a covenant in a deed executed by him, though he is not mentioned in the exordium as one of the parties to it. And therefore, where articles of agreement under seal were made between A., of the one part, and B., (without saying, of the other part), where A., for himself, his heirs and assigns, did let a house, called &c., unto the said B., for the yearly rent &c. The instrument then proceeded as follows:—"And, that the said rent may be satisfied as aforesaid, be it known unto all men, that I, C., do covenant for myself, &c., on the behalf of the said B., that is to say, that the said B. shall pay the rent and perform the other covenants." In an action brought against C., it was contended for him, that he was not bound by this covenant, because he was not a party to the deed: but Holt, C. J., held, that, though one party to a deed could not covenant with another who was no party, but a mere stranger to it, *yet one who is no party to a deed may covenant with another who is a party*, and thereby bind himself, by sealing the deed. *Salter* v. *Kidgley*, Carth. 76.

Release by indenture cannot be pleaded by a person who is not a party to it. *Storer* v. *Gordon*.

The same principles which apply to deeds of covenant are applicable to releases; for it has been decided, that a release made between certain parties cannot be set up against the claims of the releasor by a third person who is no party, though it professes to discharge him from those claims. And therefore, where, in an action brought upon a charter-party, the defendants pleaded a release, sealed with the seal of the plaintiff, by which he released the defendants from the covenants of the charter-party, and all claims and demands in respect thereof; and the plaintiff replied to this plea, that the release was made between the plaintiff and third persons, and the defendants were no parties to it, but wholly strangers, this replication was held to be good upon demurrer. Lord Ellenborough observed—"The objection is this, that, where there is such a deed as is technically called a deed inter partes, that is, a deed importing to be between the persons who are named in it as executing the same, and not, as some deeds are, general to 'all people,' the immediate operation of the deed is to be confined to those persons who are parties to it; no stranger to it can take under it except by way of remainder, nor can any stranger sue upon any of the

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covenants it contains. For this position, 2 Inst. 673, and several other authorities to which we have referred, were cited; and the same doctrine occurs in Co. Litt. 231. a. The defendants' counsel did not deny these cases, but he denied their application to a release; and he brought under our notice Cr. Eliz. 905, and Noy, 49, where, in an indenture of feoffment, between A. of the one part, and B. of the other, a letter of attorney to a stranger to the indenture to deliver seisin was adjudged good. A letter of attorney, however, passes no interest, but merely gives an authority, and such authority is essential to effectuate the conveyance from A. to B. But the release in this case, if it is to operate as a release, takes something out of the plaintiff, viz. his right to sue, and passes to the defendants an indemnity and bar against the plaintiff's claim. *This case, therefore, appears to us within the general rule, and not within the excepted case.*" *Storer* v. *Gordon*, 3 Mau. & S. 308.

Power of attorney.

Release by one who is not a party to the deed.

Applying to releases the principle of the distinction stated by Holt in *Salter* v. *Kidgley*, in regard to *covenants with* and *covenants by* strangers, it should seem, that, though a release cannot be taken advantage of by a person who is no party, yet that an instrument of this kind may operate as the release of any person who has executed it, though he were not a party; or, in other words, that the releasor need not, though the releasee must, be a party.

However, before a conclusion is formed in *any* case that an instrument has failed of effect because made for the benefit of a person who is not a party, it will be proper to scrutinize the context, bearing in mind the readiness of the courts to supply omissions, when there is reason to infer that they have resulted from clerical inadvertence, and not from design.

Release of right does not require words of limitation.

A release of a right in lands to a person seised in fee-simple need not be made to the heirs of the releasee; for if the release were made to him for one day, or one hour, it is as good as if it were made to the releasee and his heirs; for, when the right has once gone from him by his release, without any condition, &c., to him that hath the fee-simple, it is gone for ever. Co. Litt. 273. b. 274.

A release to several discharges them from claims against them respectively;

A release to A. and B. of all actions which the releasor has against them, *or either of them*, extends to actions against the releasees *severally* as well as jointly; 2 Roll. Ab. 414 (K), pl. 2; and even without the words "or either of them," the construction it seems would be the same. 2 Roll Ab. 414 (K), pl. 4; Lord Raym. 235; Touch. 344. "If I release unto you all actions which I have against you and another, in this case, notwithstanding the joint words, all actions which I have against you alone are re-

leased, for it shall be most beneficially for him to whom the release is made, and most strongly against him who makes it." *Windham's case*, 5 Rep. 7 a.

—to one of several co-debtors, discharges all.

A release to one of several co-debtors discharges all, though they are *severally* as well as jointly bound; for, "in such a case, the joint remedy being gone, the several is so likewise. 5 Bac. Ab. 702; 2 Roll. Ab. 412 (G), pl. 5; Co. Litt. 232· a.; *Dennis* v. *Payn*, Cr. Car. 551; *Brooks* v. *Stuart*, 1 Per. & D. 615. See also *Payler* v. *Homersham*, 4 Mau. & S. 427; *Rex* v. *Bayley*, 1 C. & P. 435. And the doctrine holds in regard to releases by operation of law, (vide ante, p. 794), as well as to releases by deed; Co. Litt. 264. a.; *Cheetham* v. *Ward*, 1 Bos. & P. 630; and in equity as well as at law; *Bower* v. *Swadlin*, 1 Atk. 294; (though it will be remembered that every release at law is not a release in equity; ante, p. 805); and a proviso introduced into a deed of release, that the co-debtor shall not take advantage of the release, would be repugnant and void. *Everard* v. *Herne*, Lit. Rep. 190. But a proviso, that a release shall not extend to prejudice or affect any claims which the releasor may have against the releasee jointly with a third person, is a valid qualification of the release; for the effect is not (as it would be in the instance just mentioned) to discharge the releasee and not the co-debtor, (which is an impracticable object), but merely to take the joint debts altogether out of the operation of the release: and therefore, to an action brought against the releasee and his co-debtor jointly, the release is by its express terms no bar. *Solly* v. *Forbes*, 4 J. B. Moore, 448; [*Twopenny* v. *Young*, 3 B. & Cr. 211. Where A. and B. gave the plaintiff their joint and several note to secure two separate debts, one due from A. and the other from B., it was of course held, that a release to A., though it discharged both as to the note, did not discharge B. from his separate debt. *Cocks* v. *Nash*, 4 Moo. & Sc. 162. Where it did not appear on the face of a joint bond by A., B., and C., that B. and C. were sureties for A., it was held, that a release given by the obligee to A.'s executor was no answer to an action against the survivors. *Ashbee* v. *Pidduck*, 1 Mee. & W. 564.]

Covenant not to sue does not discharge a co-debtor.

It is to be observed, that the rule, that a release to one of several co-debtors discharges all, is confined to a release, properly and technically so called; for a perpetual covenant not to sue, which (we have seen) operates as an absolute release of the covenantee, will not discharge a co-debtor; *Lacy* v. *Kinaston*, 12 Mod. 548; 1 Lord Raym. 688: *Dean* v. *Newhall*, 8 T. R. 168; though the debt of the covenantee and the third person is joint only, and not joint and

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several. This important point was decided in *Hutton* v. *Eyre*, 6 Taunt. 289, 1 Marsh. 603, where A. and B., being partners in trade, dissolved their partnership as from a future day, and agreed that neither of them should make any further purchases on the joint account. In violation of this agreement, B., before the day, contracted debts with C. and four others, on the partnership account, and afterwards compounded with his creditors. The deed of composition was executed by the five creditors, and contained a covenant by the creditors generally not to sue the debtor for any debt or sum of money then due, and that, if they did, those present should be a sufficient release. The five creditors received a dividend, and then called on A. for the residue. A. now sought to recover the sum so paid from B., who resisted the demand on the ground that the covenant in the deed of composition executed by the creditors operated as a release of both A. and B., and that therefore A. had paid the money in his own wrong; but it was held, that the covenant not to sue B. did not operate as a release of A.; for that the doctrine, that the covenant not to sue is a release, being merely designed to avoid circuity of action, *only applied as between the covenanter and covenantee, singly, and did not operate to discharge a third person, who was liable jointly with the covenantee.* [So, in *Walmesley* v. *Cooper*, 3 Per. & D. 149, 11 Ad. & E. 216, it was held, that a covenant not to sue by one partner was no bar to an action by all the partners.]

If two tenants in common grant a rent of 40*l.* to A., of course a release to one of them would extinguish but 20*l.*, as the grant is in judgment of law several. Touch. 344.

Release to one of several trustees.

[A release of breaches of trust to one trustee will generally enure to the benefit of his co-trustee. *Thompson* v. *Harrison*, 2 Br. C. C. 164; *Blackwood* v. *Borrowes*, 2 Con. & L. 459.]

Rule where the releasor has demands against the releasee in several rights.

3. *To what Demands Releases extend, both as to their Nature and Time of becoming due.*]—Where the releasor in his own right, as well as in the right of another, has demands against the releasee, the question is raised, unless precluded (as it ought always to be) by an unequivocal expression of the intention, whether the release extends to both or one only of these species of demands.

Release by executor or administrator.

A release by an executor or administrator (but without designating him as such) seems, by the better opinion, to be confined to claims in his own right, unless his only claims are in the representative character. Such, at least, is the doctrine maintained in some of the cases. Thus, in *Knight* v. *Cole*, Carth. 120, 3 Lev. 274,

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where the releasor had a demand in his own right, and another as executor, against the releasee, the Court observed, that no mention was made of releasing any suit which the releasor had in right of his executorship; therefore those words should not extend to any demand he had in that capacity, *since he at that very time had one demand in his own right.* The case, however, was partly decided upon another point. See *Payler* v. *Homersham*, 4 Mau. & S. 423, post, p. 818. So, in *Hutchinson* v. *Savage*, 2 Ld. Raym. 1306, where, in an action by an administrator, the defendant pleaded a general release of all debts, duties, and demands; to which the plaintiff replied, that, at the making of the release, (which it seems the plaintiff had executed as one of the general creditors of the defendant), the defendant was indebted to him in his own right in the sum of 6*l.*, and that he gave the release in respect of that debt; but the defendant's counsel contended, that such general release discharged the debt due to him as administrator, and cited Roll. Ab. 404. For the plaintiff, however, it was urged, that the case in Rolle had been held not to be law; and that it was certain, that, if a man grants omnia bona sua, goods which he has as administrator do not pass; and that, if the release in this cause had nothing to work upon, then perhaps it would have released this debt due to him as administrator; but, as the case was, it should enure upon the debt due to him in his own right. Powell, J., (though he seems on another occasion to have advanced, or at least to have concurred in, a different statement of the rule, see *Thorpe* v. *Thorpe*, 1 Lord Raym. 235), said, that the case in Roll. Abr. was taken out of the Year Book of Edw. 3, (39 Edw. 3, 96), at which time the law was, that a grant of omnia bona sua by an executor or administrator passed goods which he had as executor or administrator, but now that case is held contrary; and there is no difference between a grant and a release; therefore, that case of a grant of omnia bona sua will govern this present case: *but if there had been no other debts for the release to work upon, then it had released this debt.* And Holt, C. J., seems to have concurred in the concluding position of his learned brother's argument; for he observed, "if he have no goods but as administrator, they must pass by a grant of omnia bona sua." The case, however, was adjourned, and it does not appear what was the ultimate decision. On the other hand it is broadly laid down by some respectable text writers, that, "if an executor releases all actions, this will extend as well to actions which he hath in his own right, as to those which he hath as executor." 5 Bac. Ab. 700, citing 39 Edw. 3; Touch. 345.

Hutchinson v. *Savage.*

Though the cases of *Knight* v. *Cole* and *Hutchinson* v. *Savage* General conclu-

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sion from the cases.

are not, it must be admitted, a complete adjudication of the point, yet the reasonableness of the rule they support appears likely to insure its adoption at the present day in opposition to the doctrine just quoted, which seems to be founded exclusively on the passage in the Year Books, and would generally, it is conceived, conflict with the intention.

Release expressly in a particular right.

At all events, it is not to be doubted that a release made expressly in a particular right or capacity is restricted in its operation to demands arising in such right or capacity; and therefore, where A. executed to B. a release of all actions which A. had against B. *on his own account*, it was held that this did not discharge a bond which the releasor, jointly with another *as trustees*, had taken from the releasee; for that *these words could only have been put in to distinguish demands which A. had in his own right*, from those he had in right of or in trust for others. *Stokes* v. *Stokes*, 1 Lev. 272; S. C. nom. *Nokes* v. ———, 1 Vent. 35. This case seems to overrule a position much cited in the early books, that, if "a man makes a release to another by the name *of executor of J. S.*, this will release all actions which he hath *in his own right*, as well as those which he hath as executor; 2 Roll. Ab. 414 (A), pl. 5;" which is not only inconsistent with the case in question, but evidently contravenes the rule expressio unius est exclusio alterius.

Accessory follows principal.

In a release of the principal the accessory is included; and therefore a release of all debts or duties will operate as a discharge of all actions, judgments, executions, and obligations; Touch. 342; 2 Roll. Ab. 410 (B), pl. 2; and a release of judgments will extend to an execution. Touch. 343. So, a release of covenants would operate to discharge a bond given for the performance of those covenants; contrà, it seems, if the bond had been forfeited by the breach of the covenants *previously* to the release being given. *Reade* v. *Bullocke*, Dyer, 56 b (*z*). [By releasing the debt, the security for the debt is released; and therefore, where by a composition deed a creditor released his debtor from all debts, accounts, actions, claims, &c., it was held, that he had thereby discharged his lien upon an indenture of lease which had been deposited with him by the debtor as a security for his debt, so that the subsequent giving up of that deed formed no consideration for a new promise. *Cowper* v. *Green*, 7 Mee. & W. 633.]

Release of debt discharges all securities.

An entire right extinguished by a release of part.

If a man be bound to perform two things, the covenantee may discharge one of them; but an entire thing cannot be released in part.

(*z*) As to bonds given for the performance of covenants contained in indentures, which turn out to be void in toto, see *Jevons* v. *Harridge*, 1 Sid. 308; *Capenhurst* v. *Capenhurst*, 1 Lev. 45.

3 Bulst. 232. And here it should be observed, that, if the owner of a rent-charge issuing out of twenty acres releases all his right to one acre, the rent is extinguished in the whole. 2 Roll. Ab. 414; Co. Litt. 148; Shepp. Touch. 345; ante, Vol. 2, p. 60. [But it seems that a covenant not to distrain on part of the land is no release. See, however, *Butler* v. *Monnings*, Noy, 5; Harg. Co. Litt. 148. a., n. There is obviously no foundation for the doubt there expressed; as the reason on which a covenant not to exercise a legal right is held to amount to a release of the right does not apply to the case in question. See *Hutton* v. *Eyre*, ante, p. 812.

Covenant not to distrain on part of the land is no release.

It is clear that a release of all suits will extend to an execution, because an execution cannot be had without application to the Court, which is the "suit" of the party. 8 Rep. 153 b. But a release of all actions is no bar of an execution, "which is not an action, but begins when the action ends." Co. Litt. 291. a.

Execution, when released.

Distinction between "suits" and "actions."

But if a creditor by judgment or statute release to his debtor all his right, interest, or demand in the lands generally, or any particular lands of the debtor, he may notwithstanding afterwards sue out execution against the lands, for he had no right or demand in or upon the land at the time of the release. *Barrow* v. *Gray*, Cr. El. 552; see 2 Roll. Ab. 405 (T), pl. 6; 2 Lev. 215. But a release after execution levied would discharge the land; and in such case a release of part of the land extended would operate as a release of the whole, for it would be a discharge not merely of the land expressed to be released, but of the execution. And. 266; 5 Bac. Ab. 713. This doctrine often comes under consideration in practice, when it happens that a judgment creditor is willing to discharge particular lands about to be conveyed to a purchaser or mortgagee, provided he could do so without prejudice to his claim on the rest of his debtor's property—objects which the doctrine in question shews to be incompatible. [And the difficulty cannot now be avoided, as was formerly practicable where the lands were subject to the usual limitations to prevent dower, by making the donee exercise his power of appointment in favour of the purchaser or mortgagee; such appointments are now only operative against judgments of which the purchaser had no notice.]

Judgment, when released.

Particular lands cannot be discharged from judgment without releasing all.

It should be observed that a release of all demands is confined to demands existing at the time of the release, and therefore does not extend to a covenant then unbroken; for, before the breach, there is no "demand." *Hawle* v. *Kirkeby*, Moore, 34, pl. 112; Dy. 217 b; *Carthage* v. *Manby*, 2 Show. 90; *Belcher and Hudson's case*, Touch. 344; *Thorpe* v. *Thorpe*, 1 Ld. Raym. 235, 662; 1 Salk. 171. Con-

As to demands not due at the time of the release.

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trà, if the release be expressly of *covenants*. *Hancock* v. *Field*, Cr. Jac. 170; 2 Roll. Ab. 407, pl. 21. So, a release of all demands will not discharge a legacy payable at a future day; see *Lampet's case*, 10 Rep. 46 b. Contrà, if the release be expressly of *legacies*. Dy. 56; Co. Litt. 76. Where the demand in question arises out of the agreement under which the release is executed, and is part of the consideration for the release, of course the release cannot be set up as a bar to such demand. *Porter* v. *Phillips*, Cr. Jac. 623; *Thorpe* v. *Thorpe*, 1 Ld. Raym. 235, 662.

Effect of release on unaccrued rent.

[As to the effect of releases upon unaccrued *rents*, vide ante, Vol. 2, p. 59. In *Cooper* v. *Robinson*, 10 Mec. & W. 695, in replevin on a distress for rent due at Michaelmas, 1841, it was held, that a lease of the premises dated in February, 1841, but really executed after Michaelmas, 1841, habendum from 30th July, 1840, for fourteen years, at a rent of 86*l.* payable half-yearly, the first payment to be made at Lady-Day *next*, was no release. The deed operated from its execution, and the naming of a term commencing prior to its date was a mere mode of computation.]

Whether it operates up to the date or delivery.

A release of all demands up to the *making* of the release will extend to a cause of action arising in the interval between the date and delivery. *Hedley* v. *Joans*, Dyer, 307 a. But contrà, if the release be, according to the usual form, of all demands up to the day of the *date* of the release; its operation being then confined to the date. And therefore, where A., on the 1st of June, executed to B. a release dated on the 1st of March, of all demands up to the date, it was held that it did not release an obligation executed and dated on the 1st of May.

Day of the date excluded.

Drury's case, Cr. El. 14; see Roll. Abr. 410 (A), pl. 5. And the computation in such cases is *exclusive* of the day of the date. Thus, in trespass, assault, and battery, the defendant pleaded a general release of all actions, &c., from the beginning of the world usque ad diem datûs of the said release; and it happened that the battery was done upon that very day on which the release was dated; wherefore, it was held that the action was not discharged, for the release did not include that day. *Dixon* v. *Terry*, 3 Mod. 182; 5 Bac. Ab., Gwill. ed., 712. [*Nichols* v. *Ramsden*, 2 Mod. 280; *Newman* v. *Beaumond*, Owen, 50. See *Rex* v. *Haverstock*, Burr. Sett. Cas. 719.] So, in *Roche* v. *Morgell*, 2 Sch. & Lef. 730, Lord Redesdale seems to have considered, that a release of all demands "unto" a certain day did not include transactions *on* that day. From the statement of the case, however, it appears that the deed distinctly recited an intention to include the transactions of that day—a fact which is not adverted to, and was probably overlooked, by his Lordship, who, indeed, was

not driven to this line of reasoning at all, as the transactions then under his Lordship's consideration were expressly excepted out of the release. There can be no doubt that the recital of an intention to include transactions occurring on the day of the date, would be a ground for giving to the deed this extended operation, as will be shewn more fully in the next section. [In *Rex* v. *Stevens*, 5 East, 244, a statement in an indenture, that A. held an office "until the 29th November, 1794," and, whilst he held the office, did, on that day, &c., was held to be consistent, on the ground that the word was capable of either meaning. Where an arbitrator enlarged the time for making an "award" until a certain day, it was held, that that day was included. *Knox* v. *Simmonds*, 1 Ves. jun. 369, 3 B. C. C. 358; *Kerr* v. *Jeston*, 1 Dowl., N. S., 538. The exclusion of the day named, where there are no recitals evidencing a different intention, would be consistent with the now settled rule, that, where an act is to be done within a certain number of days "from" a particular day, the day named is excluded from the computation, unless there are special grounds for a different construction; a rule, however, which is partly founded on reasoning that would not be applicable to the case now under consideration. See *Young* v. *Higgon*, 6 Mee. & W. 49; *Williams* v. *Burgess*, 12 Ad. & E. 635; *Gorst* v. *Lowndes*, 11 Sim. 434; *Stanley* v. *Bond*, 1 Phill. 103; *Lester* v. *Garland*, 15 Ves. 248.]

"Until," when inclusive.

4. *Whether the general Words of a Release are restrained by the Recital.*]—It is a long-established rule in the construction of releases that the general words of the instrument are liable to be restrained by the recital, (vide ante, Vol. 3, pp. 336, 508, 542). Thus, it is laid down, that, if a man receive 10*l.* from another, and by his deed acknowledge the receipt of it, and acquit and discharge him therefrom, and from all actions, suits, debts, duties, and demands; by this release nothing is released except the 10*l.*, for the latter words have reference to the first, and are limited by them. Per Tanfield, J., 2 Roll. Ab. 409, (A), pl. 3. So, where A. recovered against B. a judgment for 6000*l.*, and made J. S. and J. D. his executors, and died; B. made C. his executor, and devised a legacy of 5*l.* to J. D., and died; J. D. by deed acknowledged the receipt of the 5*l.* for the legacy from C., and thereby released the said legacy, *and all actions, suits, and demands which he had against C., as executor of B.*, for any matter whatsoever: it was adjudged, that the general words of the release were restrained to the particular occasion, and extended only to the legacy of 5*l.*, and not to the judgment. *Knight* v. *Cole*,

Whether general words are restrained by the recital.

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Carth. 119 ; Show. 150 ; 3 Lev. 269 ; 3 Mod. 277. See also *Morris* v. *Wilford*, 2 Lev. 214 ; *Thorpe* v. *Thorpe*, 1 Lord Raym. 235 ; *Twopenny* v. *Young*, 3 B. & Cr. 209, ante, Vol. 3, p. 301. The principle was recognized in *Braybroke* v. *Inskip*, 8 Ves. 423, where a release of all claims out of the real and personal estate of a testator was held not to include the moiety of a reversion derived under the will, the recitals disclosing an intention to release a debt only, and not referring to that part of the will which related to the reversion. See also *Ramsden* v. *Hylton*, 2 Ves. sen. 310 ; *Oliver* v. *Daniel*, 1 Mer. 500, n. ; *Bailey* v. *Lloyd*, 5 Russ. 330 ; *Lindo* v. *Lindo*, 1 Beav. 496.

Payler v. *Homersham.*

The leading modern authority for this doctrine is *Payler* v. *Homersham*, 4 Mau. & S. 423, where the question was, whether a joint and several bond given by the defendant and others to the plaintiffs, who were bankers, conditioned for the payment of monies which they should advance to A., was discharged by a release contained in a general composition deed executed by the plaintiffs, as creditors of the defendant. The deed recited, that the defendant stood indebted to his creditors in the several sums set opposite to their respective names, and that they had agreed to take of him 15*s.* in the pound upon the whole of their respective debts ; and then the creditors, in consideration of the said 15*s.* in the pound, paid to them before the execution of the release, respectively released the defendant from all manner of actions, debts, claims, and demands at law and in equity, which they, or any or either of them, had against him, or thereafter could, should, or might have, by reason of any thing from the beginning of the world to the date of the release. Against the plaintiffs' name was set the sum of 2148*l.* 1*s.* 9*d.*, which was the amount of their demand against him on their own account : but no notice was taken of the demand on account of the bond, though at that time a considerable sum of money was due thereon. The defendant principally relied on a *dictum* of Lord Holt, in *Knight* v. *Cole*, 1 Show. 154, denying the position of Tanfield, J., (ante, p. 817), to be law, and which, it was said, was adopted only by Gregory, J. But the Court held that the release was no bar to the action on the bond. Lord Ellenborough said—"I do not find that Lord Holt, when he denied the authority of the case from Rolle's Abr., denied also the position of Gregory, J., that the general words of a release may be restrained by the particular recital ; common sense requires that it should be so ; and, in order to construe any instrument truly, you must have regard to all its parts, and most especially to the particular words of it. I am sorry, therefore, to find that the case cited from Lord Rolle was said not

to be law, because it seems to me to be as sound a case as can be stated. The argument for the defendant is, that this not only releases him from the obligation, but his sureties also; but the replication avers, that the monies secured by the bond were not included, or intended to be included, in the release; which averment, if it is competent to the plaintiffs in law to make, puts an end to the question. And surely, the release being of an aggregate sum, which is compounded of several debts, the plaintiffs may aver of what it is or is not compounded." Bayley, J., observed—"There is no doubt but a particular recital in a deed will restrain the general words." [So, in *Simons* v. *Johnson*, 3 B. & Ad. 175, where a deed of release recited that various disputes were subsisting between S. and J., and actions had been brought by them against each other, which were still depending; and it had been agreed, that, in order to put an end thereto, J. should pay S. 150*l*., and that each of them should execute a release to the other of all actions, causes of action, and claims, brought by him, or which he had, against the other; and the operative part contained a general release by S. to J. of "all actions and causes of action, suits, controversies, sums of money, bills, bonds, accounts, reckonings, claims, demands, &c., whatsoever, both at law and in equity," which S. had or might thereafter claim: it was held that the recital confined the operation of the deed to actions already commenced, and in which S. was the party on one side, and J. on the other; and could not be extended to the action in question, which was brought by S. against J. and another jointly. Parol evidence was admitted to shew that there were actions depending at the date of the release, and such as would satisfy its literal import, and did not include the subject-matter of the present action. (Vide ante, Vol. 1, pp. 375, 406, infra, p. 821). So, a release, expressed to be made in pursuance of an award, will be restrained by the terms of the award. *Upton* v. *Upton*, 1 Dowl. P. C. 400.]

Simons v. *Johnson.*

[Again, in *Bain* v. *Cooper*, 9 Mee. & W. 701, a composition deed was made between M. and C., of the first part; W., H., and O., of the second part; and the several *other* persons and partnership firms, who should execute the deed, of the third part; by which, in consideration of an assignment of property to W., H., and O., in trust to sell and apply the proceeds in payment of the debts due from M. & Co. to W., H., and O., and the several *other* persons or firms, parties of the third part, "each of the said creditors, parties thereto of the second and third parts, did, for themselves, their heirs, executors, administrators, and partners," release M. & Co. from all actions, claims, and demands. H., who executed the deed in his

Bain v. *Cooper.*

Release by a member of a joint-stock bank, held to be confined to his own separate demands.

RELEASES.

Recitals.

own name, was also a member of a joint stock banking company, to whom M. & Co. were indebted. In an action by the company against a surety for M. & Co.'s debt, it was held, that the release by H. did not extend to such debt. Parke, B., said, the question depended on the recitals and the language of the whole instrument taken together. "Now, even supposing the word 'partners' to be understood as applying, not merely to ordinary commercial partnerships, but also to joint stock companies, which I quite agree it ought not; at all events, it is only to be construed as applying to those firms, some partner of which should execute the deed of the third part, and so derive a benefit under the instrument. The execution by H., therefore, is not a release of any partnership debt, but only of the debt due to him individually. But I agree, that, even if it were made out that he expressly executed for his partners, we ought to construe that term according to the ordinary meaning of language, and, unless there be context to explain it otherwise, it ought not to be extended to include a joint stock banking company, which is not in ordinary parlance a partnership, although, certainly, the members are in law partners." See *Lanyon* v. *Davey*, 11 Mee. & W. 218.]

Charleton v. *Spencer.*

Reference of all matters in dispute held not to be restrained by a recital of a particular dispute.

[In *Charleton* v. *Spencer*, 3 Q. B. R., 693, where an agreement of reference under seal recited, that C. claimed a balance of 201*l.* to be due to him from S., and it was covenanted between C. and S. that all disputes and differences between them should be referred to the arbitration of B., to determine the account between them and the true balance; it was held, that all matters in dispute up to the date of the agreement, though independent of, and arising subsequently to, the matters upon which the balance of 201*l.* was claimed, were referred. "The recital merely indicated the motive of the submission; it did not limit the arbitrator's power, and there was nothing unreasonable in referring claims other than that which formed the original inducement to refer." There is an obvious difference between a release and an agreement of reference. See also *Fennel* v. *Day*, cit. 3 Moo. & Pa. 84; *Solley* v. *Forbes*, 2 Br. & B. 38: 4 J. B. Moore, 488. In *Skeffington* v. *Whitehurst*, 3 You. & C. 1, the wife of a partnership creditor of an intestate renounced the administration of his effects, and her husband shortly afterwards executed a deed, by which, after reciting the insolvency of the intestate's estate, and that the creditors had executed a composition deed, by which they had agreed that A. should have administration of the intestate's effects, and reciting that A. had given to the creditor a bond, which the latter had agreed to accept in satisfaction of the debt, it was

Skeffington v. *Whitehurst.*

Release by husband of intestate's next of kin.

declared, that the same when paid should be accepted by him in full payment and satisfaction of all sums owing from the intestate to the creditor on account of the partnership, or on any other account whatsoever, and of all claims and demands whatsoever of him on the estate or effects of the intestate. This was held to release the wife's distributive share in the residue of the intestate's estate.] (As to the construction of composition deeds between debtor and creditors, vide post, Vol. 10).

Parol evidence of intention not admissible to vary the construction. *Butcher* v. *Butcher.*

Parol evidence, it is clear, is inadmissible to enlarge or vary the construction of a deed of release. (Vide ante, Vol. 1, p. 348 et seq.) Thus, where A., the mother of B., having, on the 26th April, 1800, entered into a bond, on his behalf, for 1000*l.*; B. executed an indemnity bond, of the same date, in the sum of 2000*l.*, conditioned for the payment of 1000*l.* three months after her decease; on the 9th February, 1801, A. made a codicil to her will, by which she relinquished two debts due from B., one of 1000*l.* and one of 500*l.*, and desired him to be punctual in indemnifying her estate against the 1000*l.* bond of the 26th April; three days after the execution of this codicil, A. executed a release to B., in which, after mentioning a sum of 500*l.* for which she had his bond, and two sums of 480*l.* and 300*l.*, due to her from B., for which she had receipts, it was recited, that she had agreed to release B. from those sums, "and of and from all or any other sum or sums of money, claims, and demands thereby secured or intended to be secured, *and all other sum or sums of money, claim, and demand whatsoever.*" The deed then released him accordingly from those sums, and all claim on account of those sums, "*or for or on account of any other matter, cause, or thing whatsoever.*" It was held, 1st, that this release did not extend to the indemnity bond; and, 2ndly, that no extrinsic evidence could be admitted to explain the intentions of A. as to the release. *Butcher* v. *Butcher*, 1 N. R. 113.

Parol evidence of circumstances is admissible.

But, of course, the rule excluding parol testimony of intention to enlarge or restrain the terms of a deed of release does not preclude its admission to explain the state of the facts between the parties at the time, and on which the extent of its operation must frequently depend. This is a distinction familiar in its application to wills, and equally holds, though it does not so often occur, in relation to instruments of every other description. [Vide ante, p. 819; Vol. 1, p. 404; *Brooks* v. *Stuart*, 1 Per. & D. 615.]

RELEASES

AND

COMPOSITION DEEDS.

PRECEDENTS.

1. MUTUAL RELEASE.

1. MUTUAL RELEASE *by Deed-Poll.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, [A. B.], of &c., and [C. D.], of &c., respectively SEND GREETING. WHEREAS there have been several accounts and pecuniary transactions between the said [A. B.] and [C. D.], all of which are adjusted and settled (*a*). NOW, THEREFORE, THESE PRESENTS WITNESS, that each of them the said [A. B.] and [C. D.] *Doth*, for himself and herself, his and her heirs, executors, and administrators, release, acquit, and discharge the other of them, his and her heirs, executors, and administrators, and all his, her, and their estates and effects whatsoever and wheresoever, from and of all sums of money, accounts, reckonings, actions, suits, claims, and demands whatsoever, from the beginning of the world to the day of the date of these presents (*b*). IN WITNESS &c.

As to recitals in releases.

(*a*) Where a release is intended to be general, it is better to avoid specifying particular transactions between the parties, as such recitals frequently are held to have the effect of restraining the instrument; (vide ante, p. 817); but if, after detailing a particular transaction, it states that there were other transactions between the parties, of course the recital has no such restrictive operation. Such statements cannot be too large and indefinite where the object of the parties is general exoneration.

Variation where release is not to extend to claims of the releasor as executor.

(*b*) If it be intended that this release shall not extend to claims by one of the parties against the other, in a representative character, (as to which vide ante, p. 812), say—

"PROVIDED ALWAYS, and it is hereby declared, that nothing herein contained shall extend to release or discharge the

1. MUTUAL RELEASE.

said [C. D.], her heirs, executors, or administrators, from any claim or demand which the said [A. B.], as executor of the last will and testament (*or*, administrator of the goods, chattels, rights, and credits, *as the case may be*) of [E. F.], late of ——, deceased, now hath or hereafter shall or may have, against the said [C. D.], her heirs, executors, or administrators, by reason of any accounts, reckonings, dealings, or transactions between the said [C. D.] and the said [E. F.], deceased; anything hereinbefore contained to the contrary notwithstanding."

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2. MUTUAL RELEASE.

2. MUTUAL RELEASE *by Indenture, without Recitals, between a* PARTNERSHIP FIRM *and an* INDIVIDUAL.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [A. B.], of &c., and [C. D.], of &c., and co-partners, of the one part, and [E. F.], of &c., of the other part;

Testatum.

WITNESSETH, that, in consideration of the release hereinafter contained, by and on the part of the said [E. F.], the said [A. B.] and [C. D.] Do, and each of them DOTH, by these presents, remise, release, and for ever quit claim unto the said [E. F.], his heirs, executors, and administrators, All and all manner of actions, suits, causes of action and suit, debts, duties, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, at law and in equity, which they the said [A. B.] and [C. D.], or either of them, now have or hath, or which they or either of them, or the heirs, executors, or administrators of them or of either of them, can, shall, or may, at any time or times hereafter, have, upon or against the said [E. F.], his heirs, executors, or administrators, for or by reason or on account of any matter, cause, or thing whatsoever, up to and inclusive of the day of the date of these presents.

Further testatum.

AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the release hereinbefore contained, by and on the part of the said [A. B.] and [C. D.], he the said [E. F.] DOTH, by these presents, remise, release, and for ever quit claim unto the said [A. B.] and [C. D.], and each of them, and the heirs, executors, and administrators of them and of each of them, All and all

2. MUTUAL RELEASE.

manner of actions, suits, causes of action and suit, debts, duties, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, at law and in equity, which he the said [E. F.] hath, or which he or his heirs, executors, or administrators, can, shall, or may, at any time or times hereafter, have, upon or against the said [A. B.] and [C. D.], or either of them, or the heirs, executors, or administrators of them or of either of them, by reason or on account of any matter, cause, or thing whatsoever, up to and inclusive of the day of the date of these presents. IN WITNESS &c.

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3. CREDITOR TO DEBTOR.

3. RELEASE *from* CREDITOR *to* DEBTOR *on* RECEIVING *a* SUM *of* MONEY *in* SATISFACTION *of* DISPUTED CLAIMS.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*releasor*], of &c., of the one part, and [*releasee*], of &c., of the other part.

Recital of dealings between the parties;

WHEREAS the said [*releasor*] hath from time to time, during the period of several years past, paid and advanced various sums of money to or on the account of the said [*releasee*]; and certain other dealings and transactions have taken place between them, by means whereof the said [*releasee*] became indebted to the said [*releasor*] in a considerable sum of money.

—disputed claims;

AND WHEREAS the said [*releasor*] made certain claims and demands against the said [*releasee*], by reason of the transactions aforesaid, the validity of some part of which claims and demands was denied by the said [*releasee*]; in consequence whereof disputes and differences arose between the said parties respecting the same.

—agreement to terminate disputes by payment of a sum of money.

AND WHEREAS, for the purpose of terminating and adjusting such disputes and differences, it was lately agreed between the said [*releasor*] and [*releasee*], that the said [*releasee*] should pay to the said [*releasor*] the sum of 500*l.*, in full satisfaction and discharge of all claims and demands whatsoever; and that on receiving the same, the said [*releasor*] should execute to the said [*releasee*] such release as is hereinafter contained.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 500*l.* sterling paid by the said [*releasee*] to the said [*releasor*], at or before the execution of these presents, the receipt of which sum he

In consideration of a sum of money, creditor releases all claims to debtor.

3. CREDITOR TO DEBTOR.

the said [*releasor*] doth hereby acknowledge, and therefrom doth absolutely acquit, release, and discharge the said [*releasee*], his heirs, executors, and administrators, he the said [*releasor*], for himself, his heirs, executors, and administrators, DOTH, by these presents, remise, release, and for ever quit claim unto the said [*releasee*], his heirs, executors, and administrators, All and all manner of actions, suits, causes of action and suit, debts, duties, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, both at law and in equity, which he the said [*releasor*] now hath, or which he, his heirs, executors, or administrators, but for these presents, could, would, or might, at any time or times hereafter, have, upon or against the said [*releasee*], his heirs, executors, or administrators, for or by reason or on account of any matter, cause, or thing whatsoever, up to and inclusive of the day of the date of these presents. IN WITNESS &c.

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4. RELEASE *of a* PECUNIARY LEGACY, *framed so as to bear the* RECEIPT *for the* LEGACY DUTY (*a*). (*Simple Form*).

4. LEGATEE TO EXECUTOR OF A LEGACY.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*legatee*], of &c., one of the daughters of ——, [*testator*], of &c., Exordium.

(*a*) The 36 Geo. 3, c. 52, s. 27, (ante, p. 753), enacts, that no written receipt or discharge for any legacy or residue shall be received in evidence unless stamped with the duty imposed by the act; and, therefore, the deed of release usually executed by a legatee to an executor is not available as a discharge, unless accompanied by the receipt denoting the payment of the legacy duty, or by evidence of the actual payment of the duty; for which reason, some practitioners always frame the release in such a manner as to admit of its receiving the Stamp-office certificate of the payment of the duty. For this purpose it ought to be prepared conformably to the 36 Geo. 3, c. 52, s. 27, which requires that the instrument shall express the *date of the receipt or discharge, the name of the testator or intestate, and of the person or persons to whom the receipt is given, and to whom the legacy or residue is bequeathed or belongs, and the amount or value of the legacy or residue, and also the amount and rate of the duty payable and allowed thereon.* If the instrument contains these particulars, (all which will be found in the precedent in the text), it may properly be impressed with the stamp for legacy duty, although it does not, in other respects, correspond with the printed forms issued by Remarks upon the precedent in the text.

4. LEGATEE TO EXECUTOR OF A LEGACY.

deceased, SENDETH GREETING. WHEREAS the said [*testator*], deceased, did, in and by his last will and testament in writing,

Recital of will and probate,

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the Stamp-Office. The advantage of the plan in question is, not only that it avoids the risk of the release becoming inadmissible in evidence, from its being separated from the receipt for the duty, but that it saves the additional stamp, which the deed of release would otherwise require; for the 36 Geo. 3, c. 52, s. 41, (ante, p. 760), exempts discharges stamped according to the act from all other duty. And though, undoubtedly, this exemption would not extend to any duty imposed by subsequent acts, yet it is conceived, that, according to the tenor even of these acts, the instrument would not require any additional stamp; for, the ordinary deed stamp, which, by the act now in force, (55 Geo. 3, c. 184), is imposed on any deed "not otherwise charged," could not apply to an instrument which, by another clause in the same act, is liable to a specific denomination of duty.

Stamp-Office legacy receipt in general sufficient.

But, although, for the reasons that have been suggested, it seems better, if a release is taken, that it should bear the legacy duty, yet it is conceived, that, in general, an executor who pays a pecuniary legacy might safely be content with the ordinary Stamp-Office legacy receipt, which will operate as completely to exonerate him from being again called on to pay the legacy, as the most elaborately framed release can do; though, undoubtedly, it is usual for an executor to require a release additionally to the revenue receipt, which requisition it is believed is sanctioned by the practice of the Court of Chancery, where such releases are frequently settled by the Masters. Where the payment is not of a pecuniary legacy merely, but of the balance of a residuary account, the ground for requiring a release is certainly stronger, as it is often necessary to recite facts not stated in, or capable of being conveniently introduced into, the printed forms in use at the Stamp-Office. If the legatee is to enter into a covenant of indemnity with the executor, of course a deed is indispensable, and which, even though it bears the legacy duty, ought additionally to be stamped with the ordinary 35*s.* stamp, as a deed of covenant.

Effect of exempting legacy from duty.

It should be stated that the plan above recommended (namely, that of impressing on the release the receipt for the legacy duty) is not excluded by the fact of the legacy being given free from duty; since such exemption applies merely as between the persons interested in the exempted and onerated funds respectively, and not as between the executor and the Crown. Indeed, the sum applicable to the duty is in effect an augmentation of the legacy, though it is observable that the 36 Geo. 3, c. 52, s. 21, (ante, p. 749), exempts such sum from being liable to duty as part of the legacy; so that, in point of fact, a testator avoids a certain portion of duty by bequeathing legacies in this manner. Thus, if, instead of leaving to a person who is a stranger in blood a sum of 2000*l.* subject to legacy duty, he gives him that which to *him* is equivalent, namely 1800*l.* free from duty, the testator's general personal estate will be chargeable only with 180*l.* for the duty on the legacy, though, if the duty had been payable out of the subject-matter of the bequest, it would have amounted to 200*l.* The difference created by this exemption seems to be as little founded in reason, as an inequality of an opposite kind

4. LEGATEE TO EXECUTOR OF A LEGACY.

bearing date ——, give to his son, the said [*legatee*], a legacy or sum of 2000*l.*, and appointed [*executors*], of &c., executors of his said will. And the said [*executors*], soon after the decease of the said [*testator*], duly proved the same in the —— Court of ——, and took upon themselves the execution thereof. AND WHEREAS the legacy duty payable for the said legacy amounts to the sum of 20*l.*, being at the rate of 1*l.* per centum on the amount thereof. NOW THESE PRESENTS WITNESS, that the said [*legatee*] DOTH hereby acknowledge to have had and received from the said [*executors*] the sum of 1980*l.*, being the clear balance or residue of the said legacy or sum of 2000*l.*, so as aforesaid bequeathed by the will of the said [*testator*], deceased, to the said [*legatee*], after deducting thereout the sum of 20*l.*, which has been retained by the said [*executors*] as and for the legacy duty payable thereon as aforesaid: And that from and of the same sum of 2000*l.*, and every part thereof, he the said [*legatee*] DOTH, by these presents, for ever acquit, release, and discharge the said [*executors*], and each and every of them, and the heirs, executors, and administrators of them and of each and every of them, and all the estates and effects whatsoever and wheresoever late of the said [*testator*], deceased; And also, that the said [*legatee*], for himself, his heirs, executors, and administrators, DOTH, by these presents, remise, release, and for ever quit claim unto the said [*executors*], and each and every of them, and the heirs, executors, and administrators of them and of each and every of them, All and every actions and action, suits and suit, causes and cause of action or suit, claims and demands whatsoever, of him the said [*legatee*], for or in respect of the said sum of 2000*l.*, or the interest thereof, or any part thereof respectively. IN WITNESS &c.

and amount of legacy duty.

Testatum.

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arising under another enactment of the same statute, which has already been the subject of remark; (vide ante, p. 762); though it certainly has the merit of excluding the question, (which would otherwise have called for determination), whether the duty on the sum to be applied in satisfaction of the legacy duty should come out of the fund onerated with the rest of the duty, or be borne by the legatee.

5. OF LEGACY BEQUEATHED TO A MARRIED WOMAN.

5. RELEASE *by Deed-Poll by a* LEGATEE *and her* HUSBAND, *to* EXECUTORS, *of two* PECUNIARY *Legacies.*

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*husband of legatee*], of &c., and [*wife*], his wife, respectively SEND GREETING. Recital of will bequeathing legacy. WHEREAS [*testator*], late of ——, by his last will and testament in writing, bearing date the —— day of ——, did (inter alia) give and bequeath to his niece, the said [*wife*], therein described as the wife of the said [*husband*] (*a*), the sum of 1500*l.* sterling, to be paid within the space of two

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Legacy should be given to the wife, and not to the husband, where she is the testator's relation.

(*a*) The gift of an immediate absolute legacy to a married woman operates in effect as a legacy to the husband, who is entitled to receive it, subject indeed to the right of the executors to insist on a settlement in her favour; which, however, is rarely done, unless the embarrassed circumstances or bad conduct of the husband call for it. [See *Macmahon* v. *Burchell*, 3 Hare, 97.] Where the husband is intended to take the benefit of the bequest, the testator sometimes makes him the legatee, instead of the wife; but this in general is objectionable, if the wife is the testator's relation, and the husband is not, because it subjects the legacy to a higher rate of duty. So, where the testator wishes to cancel a debt owing to him from the husband, it is for the same reason advisable to bequeath it as a legacy to the wife, who is the testator's relation, rather than forgive it to the husband, who is a stranger in blood to him. The utility of this precaution is suggested to the Editor by a case which occurred within his observation, in which a lady, by her will, forgave to the husband of her niece a large debt. Soon after the testatrix's decease, the husband became bankrupt, and the estate did not yield the smallest dividend; so that, if the executors were bound to pay the duty of 10*l.* per cent., (from which there seemed no very obvious mode of escaping), this heavy impost would be paid for a legacy of no real value; for, if the debt had not been forgiven, it would not have produced one shilling to the testatrix's estate. Whether the duty was ultimately paid, the Editor does not know; but the case left upon his mind a strong impression of the expediency, in all instances where the wife is a relation, and the husband not a relation of the testator, of bequeathing the debt to the wife rather than forgiving it to the husband, by which means the duty in the case referred to, instead of being 10*l.* per cent. on the amount, would have been 3*l.* per cent. only, making a difference of no less than 7*l.* per cent. on several thousand pounds; and if the husband had been the son-in-law of the testator, the difference would have been increased to 9*l.* per cent. Of course the legacy would be liable to lapse if the wife died in the lifetime of the testator, but this might be prevented by an express bequest to the husband in such event.

5. OF LEGACY BEQUEATHED TO A MARRIED WOMAN.

years next after his decease, with interest for the same, after the rate of 5*l.* per centum per annum, from the day of his decease. And, after having charged the residue of his real and personal estate with the payment of his debts and legacies, the said testator did constitute and appoint [*executors*], executors of his will. AND WHEREAS the said [*testator*], deceased, by a codicil to his said will, bearing date the —— day of ——, did (inter alia) give and bequeath unto his niece, the said [*wife*], the sum of 1000*l.* in addition to what he had given to her by his said will, and to be paid as the original legacy was directed to be paid, and did thereby in all other respects confirm his said will. AND WHEREAS the said [*testator*], deceased, by a second codicil to his said will, bearing date the —— day of ——, did constitute and appoint his friend [*executor*], of &c., one of his trustees and executors jointly with those named in his said will. AND WHEREAS the said [*testator*] departed this life some time in the month of ——, without having altered or revoked the said two legacies of 1500*l.* and 1000*l.*, so by him bequeathed to the said [*wife*], in and by his said will and first codicil respectively as aforesaid. AND WHEREAS, (*recite probate of will and codicils*). NOW THESE PRESENTS WITNESS, that the said [*husband*] and [*wife*], his wife, DO hereby respectively acknowledge, declare, and testify that they have actually had and received, before the sealing and delivery of these presents, of and from the executors and trustees named and appointed in and by the said will and codicil of the said [*testator*], deceased, or some or one of them, as well the said legacy or sum of 1500*l.* by the said will of the said [*testator*], deceased, bequeathed to the said [*wife*], and thereby made payable to her within two years after his decease, with interest from the day of his decease, as also the said legacy or sum of 1000*l.* by the said first codicil to the said will bequeathed to the said [*wife*] as aforesaid, and all interest payable in respect thereof, or of either of them; and they the said [*husband*] and [*wife*], his wife, for themselves and each of them, and the heirs, executors, and administrators of them and of each of them, in consideration of the said two several sums of 1500*l.* and 1000*l.*, and interest, DO hereby remise, release, and for ever quit claim unto the said [*executors*], and each of them, and the heirs, executors, and administrators of each of them, and the heirs, executors, and administrators for the time being of the said [*testator*], deceased, all and all man-

and appointing executors;

—codicil, giving further legacy;

—second codicil, appointing another executor;

—death of testator.

Testatum.

Husband and wife respectively acknowledge receipt of legacies of 1500*l.* and 1000*l.*, and release executors from all demands in respect thereof.

5. OF LEGACY BEQUEATHED TO A MARRIED WOMAN.

ner of action and actions, causes of action, covenants, agreements, suits, controversies, differences, debts, duties, legacies, accounts, reckonings, sum and sums of money, and all other claims and demands whatsoever, both at law and in equity, which they the said [*husband*] and [*wife*], his wife, or either of them, or the heirs, executors, or administrators of them or of either of them, at any time or times hereafter, can or may have, claim, challenge, or demand against the said [*executors*], or any of them, or the heirs, executors, or administrators of them or of any of them, or the executors or administrators for the time being of the said [*testator*], deceased, or any of them, for or by reason or means of the said several legacies or sums of 1500*l.* and 1000*l.*, or either of them, or the interest thereon, or any part thereof respectively. IN WITNESS &c.

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6. OF A LEGACY WHICH HAD BEEN SETTLED ON THE LEGATEE'S MARRIAGE.

6. RELEASE *to* EXECUTORS *of a* LEGACY *for* 10,000*l.*, *which had been settled on the* MARRIAGE *of the* LEGATEE.

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*husband of legatee*], of &c., and [*legatee*], his wife, late [*maiden name*], spinster, (one of the daughters of [*testator*], late of ——, deceased); [*trustees*], of &c., (trustees named in the settlement made on the marriage of the said [*husband*] and [*legatee*], his wife), severally SEND GREETING. WHEREAS, (*recite bequest to executors of* 10,000*l. free of duty, upon trust for investment for the benefit of legatee for her life, and in case she should marry, to settle the fund for the benefit of herself, her husband, and issue; appointment of executors, death, and probate of will. Recite settlement on marriage of legatee, by which it was agreed, that, as soon as the executors should have sufficient assets, the legacy should be invested, in the names of trustees, upon the trusts therein mentioned*).

Recital of will;

—that legacy had been invested in 3*l.* per Cent. Consols,

AND WHEREAS, in pursuance of the said agreement in that behalf contained in the said indenture of settlement, the said legacy or sum of 10,000*l.*, so given and bequeathed to them the said [*executors*], in trust for the said [*legatee*] as aforesaid, hath been laid out and invested by them in the purchase of the sum of 12,380*l.*, 3*l.* per Centum Consolidated Annuities, which hath this day been transferred into the names of the said [*trustees*], in the

6. OF A LEGACY WHICH HAD BEEN SETTLED ON THE LEGATEE'S MARRIAGE.

books of the governor and company of the Bank of England, upon the trusts in the said indenture of settlement expressed and declared of and concerning the same. And all interest hitherto accrued on and become due for the said sum of 10,000*l.* hath been paid to the said [*legatee*], who was entitled thereto under the trusts of the said settlement, as they the said [*trustees*], and [*husband*], and [*legatee*], his wife, do hereby respectively acknowledge. AND WHEREAS the legacy duty payable on the said legacy or sum of 10,000*l.* amounts to the sum of 1000*l.* (*a*), being at the rate of 10*l.* per centum on the amount thereof, which sum of 1000*l.* the said [*executors*] have provided and retained out of the general personal estate of the said testator, pursuant to the directions in that behalf contained in his said will. NOW THEREFORE KNOW YE, that, in consideration of such investment, transfer, and payment respectively as aforesaid, and of all and singular other the premises, they the said [*husband*] and [*legatee*], his wife, and [*trustees*], Do, and every of them DOTH, by these presents, release, acquit, exonerate, and for ever discharge the said [*executors*], and every of them, and the heirs, executors, and administrators of them and of every of them, and the lands and tenements, goods and chattels, of them and of every of them, and also the estate and effects of the said [*testator*], deceased, from and of the said legacy or sum of 10,000*l.* in and by his said last will and testament given and bequeathed to the said [*executors*] in trust for the said [*legatee*] as aforesaid, and all interest hitherto accrued and become due for the same, and also from and of all and all manner of actions, suits, causes of action and suit, sums of money, debts, accounts, reckonings, controversies, damages, claims, and demands whatsoever, at law and in equity, which they the said [*husband*] and [*legatee*], his wife, and [*trustees*], or any of them, now have or hath, or ever had, or which the executors, administrators, or assigns of them or of any of them could or might (if these presents had not been made) have had, claimed, or demanded, from or against them the said [*executors*], or any of them, or the heirs, executors, or administrators of them or of any of them,

and that all interest had been paid.

—that executors had provided for the legacy duty.

Testatum.

Release by legatee and her husband, and the trustees of her marriage settlement.

(*a*) This precedent illustrates an observation, ante, p. 826. The legatee, though described as the child of the testator, was illegitimate, so that the maximum duty of 10*l.* per cent. applicable to strangers in blood became payable.

6. OF A LEGACY WHICH HAD BEEN SETTLED ON THE LEGATEE'S MARRIAGE.

or of, from, or against the estate and effects of the said [*testator*], deceased, for or on account of the said legacy or sum of 10,000*l.*, or any part thereof, or any interest for the same, or for or by reason or means or on account of any act, transaction, matter, or thing whatsoever in anywise relating thereto. IN WITNESS &c.

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7. BY RESIDUARY LEGATEES TO EXECUTORS.

7. RELEASE *to* EXECUTORS, *by a* SURVIVING RESIDUARY LEGATEE, *and the* EXECUTORS *of a deceased* RESIDUARY LEGATEE. (*Variation where a Covenant to* PAY *any* UNSATISFIED DEBTS *of the Testator that may be discovered, and also generally to indemnify, is added*).

Recital of will of original testator;

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*surviving legatee*], of &c., and [*executors of deceased legatee*], of &c., SEVERALLY SEND GREETING. WHEREAS [*testator*], late of ——, by his last will and testament in writing, bearing date on or about the —— day of ——, after appointing [*executors*], of &c., to be executors of his said will, directed them to pay his debts, and, after payment thereof, and of the pecuniary legacies thereinafter bequeathed, to invest the residue of the money arising from his personal estate in the 3*l.* per Centum Consolidated Bank Annuities. And the said testator bequeathed the income thereof to his father [L. M.], during his natural life; and, after his decease, the said testator gave and bequeathed one half of the said annuities to his brother, [*surviving legatee*], and the other half to his brother-in-law, the said [*deceased legatee*]. And the said testator bequeathed some small pecuniary legacies to the persons therein named. (*Testator's death, and probate of will*). AND WHEREAS the said [*deceased legatee*] departed this life on or about the —— day of ——, having, by his last will and testament, bearing date the —— day of ——, after reciting the said will of the said [*testator*], deceased, given and bequeathed all the interest and property he then had or might be entitled to under or by virtue of the said will unto the said [*executors of deceased legatee*], *In trust* that they or the survivor of them (*state trusts*)(*a*); AND WHEREAS

—death of testator;

—death and will of one of the residuary legatees;

(*a*) But, as the trustees are also executors, in which character they are

7. BY RESIDUARY LEGATEES TO EXECUTORS.

the said will of the said [*deceased legatee*] was duly proved by the said [*executors of deceased legatee*], the executors therein named, in the said Prerogative Court. AND WHEREAS the said [L. M.], the father of the said testator, [*testator*], died on or about the —— day of ——. AND WHEREAS the said [*executors*] have paid and satisfied all the debts of the said testator, [*testator*], so far as the same have come to their knowledge, and also his funeral and testamentary expenses, and the pecuniary and specific legacies bequeathed by his will; and the clear residue of the personal estate of the said [*testator*] now consists of £—— 3*l.* per Centum Consolidated Bank Annuities, to one moiety of which the said [*surviving legatee*] is entitled, and to the other moiety of which the said [*executors of deceased legatee*] are entitled, as executors of the said [*deceased legatee*] deceased, subject, as to both the said moieties, to the payment of such of the debts (if any) of the said testator, [*testator*], as now remain unpaid. AND WHEREAS the said [*surviving legatee*] and [*executors of deceased legatee*], have carefully examined the accounts of the said [*executors*], as executors as aforesaid, and the amount and application of the personal estate of the said testator, [*testator*], deceased, and the different vouchers for the same, and are perfectly satisfied with such accounts. AND WHEREAS the said [*executors*], at the request of the said [*surviving legatee*] and [*executors of deceased legatee*], (testified by their respectively executing these presents), have, previously to the execution of these presents, transferred one moiety of the said £—— 3*l.* per Centum Consolidated Bank Annuities into the name of the said [*surviving legatee*], and the other moiety thereof into the names of the said [*executors of deceased legatee*], in the books of the governor and company of the Bank of England, as the said [*surviving legatee*] and [*executors of deceased legatee*], respectively, do hereby acknowledge. NOW KNOW YE, AND THESE PRESENTS WITNESS, that, in consideration of the transfer of the said £—— 3*l.* per Centum Consolidated Bank Annuities, so made in manner hereinbefore mentioned, and in con-

—decease of prior legatee for life;

—that the executors of the first testator's will had paid his debts, legacies, &c.;

—that the legatees are satisfied with the executors' accounts;

—transfer of stock by the executors into the names of the legatees.

Testatum.

In considera-

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competent to give the discharge, it seems unnecessary to detail the trusts, and then the words would be—

"unto the said [*executors*], upon certain trusts therein mentioned."

7. BY RESIDUARY LEGATEES TO EXECUTORS.

sideration of other the premises, the said [*surviving legatee*] and [*executors of deceased legatee*] Do, and every of them DOTH, by these presents, remise, release, and for ever quit claim unto the said [*executors*] and each of them, and the heirs, executors, and administrators of them and each of them, and the executors and administrators of the said [*testator*], deceased, all and all manner of actions, suits, cause and causes of action and suit, debts, duties, sum and sums of money, accounts, reckonings, legacies, claims, and demands whatsoever, at law and in equity, which they the said [*surviving legatee*] and [*executors of deceased legatee*], or any of them, or any other person or persons on the account of them or any of them, now have or hath, or which they or any of them, or the heirs, executors, or administrators of them or any of them, can, shall, or may, at any time or times hereafter, have, claim, challenge, or demand, upon or against the said [*executors*] or either of them, or the heirs, executors, or administrators of them or either of them, or other the executors or administrators for the time being of the said [*testator*], deceased, for or by reason or on account of the personal estate of the said testator, [*testator*], deceased, or any part or parts thereof, or for or by reason or means of any act, matter, or thing in anywise relating thereto (*b*). AND the

tion of transfer of stock, transferees release to executors.

Variation where surviving legatee and a person interested under the will of the deceased legatee join in a covenant of indemnity to the executor.

(*b*) As the executors would be liable to satisfy any latent claims on the testator's estate, it seems reasonable, that, previously to parting with the stock, they should have from the legatees a covenant to refund in case of any such claims being made. Vide ante, Vol. 4, p. 435, n. And this, of course, is the more important where the testator's death is recent; indeed an executor cannot safely pay over the residue to the residuary legatee at an early period without risk, for, where an action was brought against the executor of a lessee to recover damages for the breach of a covenant to repair, and the executor pleaded plene administravit, it was held that this plea was not supported by shewing that he had, before notice of the claim, paid over the residue to the residuary legatee, it appearing to have been done within six months after the testator's death, which the Court considered was not sufficient time for ascertaining the existence of claims against the estate. *Davis* v. *Blackwell*, 2 Moo. & Sc. 7. Where, as in the instance of the precedent in the text, the testator's property is transferred to persons who have no beneficial interest, the executor can have no indemnity, as it is not to be expected that executors in trust should render themselves personally responsible in this manner. The following variations apply to the case of a person beneficially interested under the will of the deceased legatee joining with the surviving legatee in entering into the covenant.

Recital of pos-

"AND WHEREAS it has been considered, that, although the

said [*surviving legatee*], as to one moiety of the said £—— 3*l.* per Centum Consolidated Bank Annuities; and the said

7. BY RESIDUARY LEGATEES TO EXECUTORS.

said [*executors*] have paid and satisfied all the debts owing from the said [*testator*], deceased, which have come to their knowledge, yet some latent claims and demands against his estate may yet remain unsatisfied; and therefore, and for the purpose of saving harmless the said [*executors*] from all risk by reason thereof, the said [*surviving legatee*] and [A. B.], who, under the hereinbefore-recited trusts of the will of the said [*deceased legatee*], is entitled to a beneficial interest in the moiety of the said 3*l.* per Centum Consolidated Bank Annuities which passed by such will, have consented and agreed to enter into the covenant with the said [*executors*] hereinafter contained. NOW THEREFORE THIS INDENTURE FURTHER WITNESSETH, that they the said [*surviving legatee*] and [A. B.] Do hereby, for themselves, their heirs, executors, and administrators jointly and each of them, for himself, his heirs, executors, and administrators severally, Doth covenant and agree with the said [*executors*], their executors and administrators, that, in case at any time or times hereafter it shall be discovered that any debts or debt, or sums or sum of money due or owing from the said [*testator*], deceased, still remain or remains unsatisfied, and the said [*executors*] or any of them, or the executors or administrators of them or any of them, or other the personal representative or representatives for the time being of the said [*testator*], deceased, shall be called on and required to pay such debts or debt, sums or sum of money, then and in such case, and so often as the same shall happen, the said [*surviving legatee*] and [A. B.], respectively, and their respective heirs, executors, and administrators, or some or one of them, will or shall forthwith pay, or cause to be paid, to the said [*executors*], or the survivor of them, or the executors of such survivor, or other the personal representatives or representative for the time being of the said [*testator*], deceased, such sums or sum of money as they or he shall have been so called on and required to pay as aforesaid; *And further*, that they the said [*surviving legatee*] and [A. B.], respectively, and their respective heirs, executors, and administrators, will and shall, at all times hereafter, effectually save harmless and keep indemnified the said [*executors*] respectively, and their re-

sible existence of unpaid debts.

and agreement to indemnify.

Further testatum.

Joint and several covenants with executors, to pay any unsatisfied claim,

and generally to indemnify executors.

7. BY RESIDUARY LEGATEES TO EXECUTORS.

[*executors of deceased legatee*], as to the remaining moiety thereof, do hereby respectively covenant and declare, that the sum of £—— 3*l.* per Centum Consolidated Bank Annuities are and shall continue subject to the payment of all such debts, if any, of the said testator, [*testator*], deceased, as now remain unpaid or unsatisfied. IN WITNESS &c.

Legatees declare that the sum transferred shall stand charged with the debts of the testator, if any.

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spective executors and administrators, and other the personal representatives or representative for the time being of the said [*testator*], deceased, from and against all costs, charges, damages, and expenses whatsoever, by reason or in consequence of the said transfer so as aforesaid made by the said [*executors*] as aforesaid of the said £—— 3*l.* per Centum Consolidated Bank Annuities into the name of the said [*surviving legatee*], and of the transfer of the said £—— like annuities into the names of the said [*executors of deceased legatee*], or of any matter, cause, or thing in anywise relating thereto. *Provided always*, and it is hereby declared, that nothing herein contained shall extend, or be construed to extend, to bind or render liable the said [*surviving legatee*], his heirs, executors, or administrators, to the payment of any greater or larger sum than the value of the said £—— 3*l.* per Centum Consolidated Bank Annuities, transferred into the name of him the said [*surviving legatee*] as aforesaid, according to the market price thereof on the day of such transfer, nor to bind or render liable the said [A. B.], his heirs, executors, or administrators, to the payment of any greater or larger sum than the value of the said £—— 3*l.* per Centum Consolidated Bank Annuities so transferred into the names of the [*executors of deceased legatee*] as aforesaid, according to the market price thereof on the day of such transfer; any thing hereinbefore contained to the contrary notwithstanding. IN WITNESS" &c.

Proviso, limiting the responsibility of each covenantor to the value of stock transferred.

8. GENERAL RELEASE *from a* RESIDUARY *Legatee to a surviving Executor, with special* RECITALS *of Transactions in the Trust, by which Losses had accrued, and the Executors had incurred Responsibility;* COVENANT OF INDEMNITY *against the* COVENANTS *in Leases assigned by the Executor to the Legatee.*

8. RESIDUARY LEGATEE TO A SURVIVING EXECUTOR.

THIS INDENTURE, made the —— day of ——, BETWEEN [*legatee*], of &c., of the one part, and [*surviving executor*], of &c., of the other part. (*Recite the will of the testator whereby the whole of his real and personal property was devised and bequeathed to his executors, in trust to sell and convert the same, and invest the monies arising therefrom on government or real security, for the benefit of the testator's widow, for life, and, after her decease, in trust for the legatee, his nephew, absolutely; also, the death of the testator without revoking or altering his will, and probate.* AND WHEREAS the said [*widow*] departed this life on the —— day of ——, having from time to time during her life received from the said [*executors*] the dividends and interest arising from the funds in which the trust monies constituting the residuary personal estate of the said [*testator*], deceased, had been invested; and also the rents and income arising from so much of the said trust estate as from time to time remained unsold and unconverted. AND WHEREAS the said [*deceased executor*] also departed this life on the —— day of —— last. AND WHEREAS the said [*surviving executor*], during the life of his co-executor, the said [*deceased executor*], did not personally act or interfere in the management of the affairs of the said trust estate, except for the purpose of executing conveyances and transferring funds, and performing other acts of a similar nature, at the instance and request of the said [*deceased executor*], who had been the confidential agent and adviser of the said testator, and was more intimately conversant with his affairs than the said [*surviving executor*]; on which account the said [*deceased executor*], with the consent and acquiescence of the said [*surviving executor*], assumed the entire and exclusive management of the said trust estate. AND WHEREAS the said [*surviving executor*], having great

Parties.

Recital of will, &c.;

—of the death of legatee for life;

—of death of releasee's co-executor;

—that the deceased co-executor had assumed the principal management;

—that the re-

8. RESIDUARY LEGATEE TO A SURVIVING EXECUTOR.

confidence in his co-executor, the said [*deceased executor*], did not obtain from him full and satisfactory explanations as to the intended employment and application of the monies which from time to time, by the means aforesaid, were placed at the sole and exclusive disposal of the said [*deceased executor*]. AND WHEREAS, upon the decease of the said [*deceased executor*], an investigation of the affairs of the said trust estate took place, when it was discovered that he had applied to his own use certain sums of money, the produce of portions of the said trust property which had been sold by the said [*deceased executor*] and [*surviving executor*], as aforesaid, and had otherwise neglected the due execution of the trusts created by the said recited will; particularly, in omitting to sell and convert into money certain parts of the said residuary trust estate; by reason whereof the said [*widow*] had received out of the said trust property an annual income considerably exceeding what she would have been entitled to if the said trust property had been duly converted and the produce thereof invested pursuant to the trusts of the said will (*a*); and the value and amount of the reversionary interest of the said [*legatee*], under or by virtue of the said will, had been proportionally diminished and deteriorated. AND WHEREAS the estate of the said [*deceased executor*], at the time of his decease, was insolvent, and wholly inadequate to the payment of his debts; and, therefore, the said [*legatee*] called upon and required the said [*surviving executor*] to make good the said losses and deficiencies which accrued to the said trust estate by reason of the transactions aforesaid. AND WHEREAS the said [*surviving executor*] having declared his intention to resist the said claim and requisition of the said [*legatee*], the said [*legatee*] filed a bill in the High Court of Chancery against the said [*surviving executor*] and the administrator of the goods, chattels, and credits of the said [*deceased executor*], for the purpose principally of charging the said [*surviving executor*] with the losses and deficiencies arising from the hereinbefore-recited transactions in the said trust; and the said [*surviving executor*] put in an answer to the said bill.

leasee had placed monies at the disposal of his co-executor, without information as to the application thereof;

—that various breaches of trust had been discovered to have been committed by the deceased executor;

—that deceased executor had died insolvent;

—that legatee had filed a bill in Chancery against the surviving executor, &c.;

(*a*) As to this point, vide infra, Vol. 10. When breaches of trust have been committed, to which the release is meant to extend, it is better to recite them, in order to preclude the allegation of their not having been known to, or in the contemplation of, the releasor. Vide ante, p. 805.

8. RESIDUARY LEGATEE TO A SURVIVING EXECUTOR.

—agreement for compromise;

And whereas, for the purpose of preventing further litigation between the said [*surviving executor*] and [*legatee*], and in regard that the said [*legatee*] is now fully convinced that the said [*surviving executor*] was ignorant of the breaches of trust committed by the said [*deceased executor*], and that the conduct of the said [*surviving executor*] arose entirely from an erroneous conception of the duties legally devolving upon him as such executor as aforesaid, and not from any corrupt or dishonourable motive; and taking into consideration, moreover, the long and intimate friendship that subsisted between the said [*surviving executor*] and the said testator, the said [*legatee*] hath consented to enter into the following arrangement and compromise with the said [*surviving executor*]: (That is to say), That the said [*surviving executor*] should pay the bill of costs of the solicitor of the said [*legatee*], as well in and about the said suit in Chancery, as otherwise for business transacted in relation to the said claim of the said [*legatee*] against the said [*surviving executor*]; and should, at the costs and charges of the said [*surviving executor*], deliver up and effectually assign and transfer to the said [*legatee*], all and singular the trust estates, monies, and property now in the hands of the said [*surviving executor*], and that thereupon the said [*legatee*] should not further prosecute the said suit, but should allow the same to be dismissed, and should also execute to the said [*surviving executor*] a general release in manner hereinafter contained; and it was further agreed by and between the said [*legatee*] and [*surviving executor*], that, inasmuch as part of the said trust estate consisted of leasehold property, held subject to the payment of rents, and to the observance and performance of certain covenants, to which the said [*surviving executor*], as the personal representative of the said [*testator*], deceased, would continue liable notwithstanding the assignment thereof intended to be made to the said [*legatee*], the said [*legatee*] should execute to the said [*surviving executor*] such covenant of indemnity concerning the same as is hereinafter contained (*b*); *And, lastly*, it was agreed that the

(*b*) It is clear that the executor of a lessee assigning leaseholds to a legatee, whether specific or residuary, is entitled to an indemnity against the rent and covenants of the lease, to which, notwithstanding the assignment, he continues liable to the extent of the assets that have reached his hands. *Simmons* v. *Bolland*, 3 Mer. 547, ante, p. 172,

8. RESIDUARY LEGATEE TO A SURVIVING EXECUTOR.

costs of these presents, and otherwise attending the performance of the said agreement, should be paid by the said [*surviving executor*]. AND WHEREAS, in pursuance of the said agreement, the said [*surviving executor*] hath paid the bill of costs of Mr. ——, the solicitor of the said [*legatee*], in the said suit of "[*plaintiff*] v. [*defendant*]," and otherwise concerning the matters aforesaid, amounting to the sum of £——. AND WHEREAS, in further pursuance of the said agreement, by indenture of even date herewith, made between the said [*surviving executor*] of the one part, and the said [*legatee*] of the other part, the said [*surviving executor*] hath assigned to the said [*legatee*] all and singular the messuages, gardens, and pieces or parcels of ground, situate at ——, lately belonging to and in the occupation of the said [*testator*], deceased, and held by him under two indentures of lease, one bearing date the —— day of ——, for the term of —— years, commencing from the —— day of ——, at the yearly rent of £——, and the other of them bearing date &c., and subject to certain covenants and agreements on the part of the said [*testator*], his executors, administrators, and assigns, to be observed and performed. AND WHEREAS, in further pursuance of the said agreement, the said [*surviving executor*] hath this day transferred into the name of the said [*legatee*] the sum of £—— Long Annuities, and also the sum of £—— Bank Stock, constituting other part of the property of the said [*testator*], deceased. AND WHEREAS, in further pursuance of the said agreement, the said [*surviving executor*] hath this day paid to the said [*legatee*] the sum of £——, being the balance remaining in the hands of Messrs. —— & Co., of ——, bankers, to the credit of the said trust estate of the said [*testator*], deceased; which sum of £—— constitutes the entire residue of the said trust property in the hands of the said [*surviving executor*] as aforesaid. AND WHEREAS the said [*surviving executor*] having in manner aforesaid performed the whole of his part of the hereinbefore-recited agreement, the said [*legatee*], in pursuance thereof on his part, hath caused the bill filed by him in the said Court of

—execution of agreement by release;

—of assignment of leaseholds of even date;

—of the transfer of funds,

—payment of money balance;

—that bill in Chancery had been dismissed.

Vol. 4, p. 435. It seems better to introduce the covenant into this deed than into the deed of assignment, as that is delivered up to the legatee, though, as between a vendor and purchaser, the covenant is frequently, in order to avoid expense, inserted in the assignment.

8. RESIDUARY LEGATEE TO A SURVIVING EXECUTOR.

Testatum.

Release by legatee to surviving executor.

Chancery, as hereinbefore recited, in the said cause of "[*plaintiff*] v. [*defendant*]," to be dismissed (*c*). NOW THIS INDENTURE WITNESSETH, that, in further pursuance of the said agreement on the part of the said [*legatee*], and for and in consideration of the premises, he the said [*legatee*] DOTH by these presents acquit, release, exonerate, and for ever discharge the said [*surviving executor*], his heirs, executors, and administrators, and his and their lands and tenements, goods and chattels, of and from all and every the trusts reposed in the said [*deceased executor*] and [*surviving executor*], in and by the hereinbefore-in-part-recited will of the said [*testator*], as such trustees and executors as aforesaid, and which devolved upon and became vested in the said [*surviving executor*] by survivorship as aforesaid, And of and from all and all manner of actions, suits, causes of action or suit, debts, dues, sums of money, accounts, reckonings, judgments, bills, bonds, specialties, damages, claims, and demands whatsoever, either at law or in equity, which the said [*legatee*] now hath, or which he, his heirs, executors, or administrators, may hereafter have, claim, challenge, bring, or be entitled unto, upon or against the said [*surviving executor*], his heirs, executors, or administrators, for or by reason or means or on account of the trusts contained in the hereinbefore-recited will of the said [*testator*], deceased, or of any acts, proceedings, neglects, or defaults of him the said [*surviving executor*], either concurrently with the said [*deceased executor*] in his lifetime, or solely since his decease, or in any other manner howsoever, or for or by reason or in consequence of any losses, diminution, damages, or expenses which may have happened or accrued to, or have been incurred by, the trust estate of the said [*testator*], deceased, or to or by the said [*legatee*] by reason or in consequence of such acts, proceedings, neglects, or defaults, or of any other matter, cause, or thing incidental to, or connected with, the said trust estate, or the will of the said testator, whether the same have been particularly mentioned or

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As to dismissing bill.

(*c*) [As the causing a bill to be dismissed is attended with some expense, a covenant not to prosecute the bill is frequently given in lieu of dismissing it. Where this is done, the above recital must be omitted. Even a covenant not to prosecute the suit is superfluous, except for the purpose of giving a right to sue at law for damages in the very improbable event of any further proceedings being taken under it.]

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referred to in the recitals of this present indenture or not (*d*). AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the premises, he the said [*legatee*], for himself, his heirs, executors, and administrators, DOTH hereby covenant and agree with the said [*surviving executor*], his executors and administrators (*e*), that he, the said [*legatee*], his heirs, executors, and administrators, will and shall, from time to time, and at all times hereafter, well and effectually save harmless and keep indemnified the said [*surviving executor*], his heirs, executors, and administrators, *And also* the heirs, executors, or administrators for the time being of the said [*testator*], deceased, from and against all sum and sums of money, losses, costs, charges, damages, and expenses whatsoever, which he or they shall or may pay, bear, sustain, incur, or be put unto by reason or on account of the non-observance or non-performance by the said [*legatee*], his executors, administrators, or assigns, of any or either of the covenants contained in the indentures of lease of the —— day of ——, and the —— day of ——, respectively hereinbefore referred to, or either of them, and

Further testatum.

Covenant of indemnity.

(*d*) As to the doctrine that the general words of a release are restrained by the recital, vide ante, p. 317. If the releasing party has any claims against the releasee in his own right, to which the release is not to extend, the following proviso, though not, it is conceived, necessary, (vide ante, p. 312), may be usefully added, for the purpose of excluding all doubt.

Variation where release is restrained to claims by the releasor as legatee.

"PROVIDED ALWAYS, and it is hereby declared, that nothing herein contained shall extend to release or prejudice any claim or demand which the said [*legatee*] now hath, or which he, his executors or administrators, may hereafter have against the said [*surviving executor*], in any manner other than in the capacity or character of legatee named in the will of the said [*testator*], deceased, any rule of law or equity to the contrary notwithstanding."

(*e*) [If the suit is not dismissed, say here—

Covenant not to prosecute the suit.

"that he the said [*legatee*] will not, nor shall his executors or administrators, or any person or persons claiming through, under, or in trust for him, them, or any of them, in any way prosecute, carry on, continue, or revive the said suit or cause of "[*plaintiff*] v. [*defendant*]," or any suit or cause for such relief as is prayed for in and by the said bill so filed by him the said [*legatee*] as aforesaid."]

on the lessee's part to be observed and performed, touching or concerning the premises comprised in the indenture of assignment of even date herewith, executed by the said [*surviving executor*] to the said [*legatee*] as aforesaid, or of any other matter or thing in anywise relating thereunto. In WITNESS &c.

8. RESIDUARY LEGATEE TO A SURVIVING EXECUTOR.

9. RELEASE *and* COVENANT *of* INDEMNITY *by* LEGATEES *to* EXECUTORS *and* TRUSTEES *transferring a* PECUNIARY LEGACY *without deducting Legacy Duty, the Liability to which was doubtful.*

9. PECUNIARY LEGATEES TO EXECUTORS AND TRUSTEES.

THIS INDENTURE, made the —— day of ——, BETWEEN [*legatees*], of &c., of the one part; and [*executors*], of &c., of the other part. (*Recite will, whereby the sum of* 2000*l.* *was bequeathed to executors, in trust to invest the same in Government stock, and to pay the dividends to* [A.] *for life, and, after her decease, to transfer and divide the principal equally between her children living at her decease; also the death of testator, and probate of his will*). AND WHEREAS, in or about the month of March, 18—, the said [*executors*] accounted with the residuary legatees named in the said will for the balance or residue of the personal estate of the said testator, after paying and retaining the debts owing by him, and the pecuniary legacies bequeathed by his said will; and upon that occasion the said [*executors*] retained in their hands the said sum of 2000*l.* on account of the hereinbefore-recited legacy. And the said [*executors*], out of the said legacy of 2000*l.*, paid to the receiver-general of her Majesty's stamp duties the legacy duty payable thereon, amounting to the sum of 160*l.*, being at the rate of 8*l.* per centum, which was the rate of duty payable by legatees strangers in blood to the testator, according to the act of Parliament then in force. AND WHEREAS the said [*executors*] invested the sum of 1840*l.*, the residue of the said legacy or sum of 2000*l.* remaining in their hands after paying the legacy duty, in the purchase in their own names of 3440*l.* 3*l.* per Centum Consolidated Annuities. AND WHEREAS the said [*executors*] received the dividends arising from the said Consolidated Annuities, and paid the same from time to time as they accrued to the said A. until her decease, which event

Parties.

Recital of bequest to A. for life, and then to her children living at her decease;

—payment of legacy duty according to the act then in force;

—payment of dividends to legatee for life;

9. PECUNIARY LEGATEES TO EXECUTORS AND LEGATEES.

took place in the month of March last. AND WHEREAS the said [*legatees*] are the only children of the said A. who survived her, and they have now called upon the said [*executors*] to transfer to and divide among them the said 3440*l.* 3*l.* per Centum Consolidated Annuities, pursuant to the trusts of the said recited will. AND WHEREAS the said [*executors*] are advised that doubts exist, whether, consistently with some decisions of the Court of Exchequer (*a*), they ought not to pay to her Majesty's Receiver General such sum of money as would make up the difference between the legacy duty actually paid by them in the year 18— as aforesaid, and the sum which, according to the act of Parliament now in force regulating such duty, would have been payable on such legacy at the present time, if no such retainer thereof and payment of duty had taken place as aforesaid; but, as the said [*executors*] have been advised, and are of opinion, that it could not have been the intention of the Legislature (*b*) that there should be two several and distinct periods for paying the legacy duty, they have consented to transfer the said 3440*l.* 3*l.* per Centum Consolidated Annuities to the said [*legatees*], on their entering into the covenant of indemnity hereinafter contained (*c*). NOW THIS INDENTURE WIT-

—that releasors are the only surviving children of deceased legatee for life;

—question as to the legacy duty;

Testatum.

(*a*) Vide ante, pp. 770, 780.

(*b*) [These words taken in connexion with the fact that professional opinions were divided as to the law, would no doubt rescue the present deed from the imputation of intention to evade the law, and consequent invalidity. Vide ante, Vol. 3, p. 364.]

(*c*) Sometimes property is transferred to several specific legatees on their covenanting to answer latent debts, which the executors may be called upon to pay, in proportion to the value of their respective bequests. The following is a form of the recitals and covenants adapted to such a case. After reciting the agreement for the indemnity—

Variation where specific legatees covenant to answer debts in certain proportions.

"AND WHEREAS, for the purpose of ascertaining the amount of the money which the said [A. B.] and [C. D.] shall be respectively liable to pay under the covenants for that purpose hereinafter contained, it has been agreed that the value of the said sums of 2000*l.* 3*l.* per Centum Consolidated Annuities, so specifically bequeathed to the said [A. B.], and transferred to her by the said [*executors*], as hereinbefore mentioned, shall be considered and taken to be the sum of 1734*l.* 13*s.* 9*d.* sterling, and that the value of the said leasehold messuage so specifically bequeathed to

9. PECUNIARY LEGATEES TO EXECUTORS AND TRUSTEES.

NESSETH, that (*legatees acknowledge the transfer of the fund to them respectively in equal shares, and release the executors from all claims on account of the legacy, ut ante, p.* 833). AND THIS INDENTURE FURTHER WITNESSETH, that, in pursuance of the hereinbefore-recited agreement in that behalf, the said [*legatees*] do, for themselves, their heirs, executors, and administrators, jointly, and each of them doth, for himself, his heirs, executors, and administrators, separately, covenant with the said [*executors*], their executors and administrators, that they the said [*legatees*], or some or one of them, or the heirs, executors, or administrators of them or of some or one of them, will or shall at all times hereafter effectually save harmless and keep indemnified the said [*executors*] respectively, and their respective heirs, executors, and administrators, from and against all losses, costs, charges, damages, and expenses whatsoever, which they or he shall or

Release by legatees to executors.

Further testatum.

Legatees covenant with executors to indemnify them by reason of the transfer of fund, without a further deduction of legacy duty.

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the said [C. D.], and assigned to him by the said [*executors*] as hereinbefore mentioned, shall be considered and taken to be the sum of £——, being the sums at which the same legacies were respectively valued by the Commissioners of Stamps, in order to ascertain the amount of the legacy duty payable thereon respectively. NOW THIS INDENTURE WITNESSETH, that, in pursuance and further performance of the said agreement, and in consideration of the premises, each of them the said [A. B.] and [C. D.] doth hereby, for herself and himself, her and his heirs, executors, and administrators, covenant and agree with the said [*executors*], and their respective executors and administrators, that they the said [A. B.] and [C. D.], respectively, and their respective executors or administrators, in proportion to the value (so fixed as aforesaid) of the legacies so specifically bequeathed to them the said [A. B.] and [C. D.], as hereinbefore mentioned, will and shall, at any time or times hereafter, upon the request in writing of the personal representatives or representative for the time being of the said [*testator*], deceased, pay to them or him all such sum or sums of money as shall or may be required for paying, answering, or satisfying all the debts, claims, and demands, (if any), of, upon, or against the estate of the said [*testator*], deceased, which have not yet been ascertained to exist, and which the said estate shall be justly liable to pay, answer, or satisfy."

9. PECUNIARY LEGATEES TO EXECUTORS AND TRUSTEES.

may sustain, incur, or be put unto, by reason or in consequence of the said transfer to the said [*legatees*] of the said 3440*l.* 3*l.* per Centum Consolidated Annuities, without retaining or deducting and paying any sum on account of the legacy duty, other than and in addition to the said sum of 160*l.* so paid by the said [*executors*] on account thereof as aforesaid, or for or by reason of any matter, cause, or thing in anywise relating thereunto. IN WITNESS &c.

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10. BY EXECUTOR AND LEGATEES IN TRUST OF COVENANTEE.

10. RELEASE *of a* COVENANT *to pay a Sum of Money by the* EXECUTOR *and* LEGATEES *in* TRUST *of the Covenantee, in Consideration of Transfer of Stock, and* DECLARATION *of* TRUST *thereof; (the Releasee being Cestui que Trust for Life of the Stock).*

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*trustees*], of &c., and [*executor*], of &c., SEVERALLY SEND GREETING. WHEREAS, by an indenture of six parts, bearing date on or about the —— day of ——, and made between [*covenantor*], of &c., of the first part; [*covenantee*], of &c., of the second part; and various other persons of the remaining parts; the said [*covenantor*] did, for himself, his heirs, executors, and administrators, covenant with the said [*covenantee*], her executors, administrators, and assigns, that he the said [*covenantor*], his heirs, executors, or administrators, would pay or cause to be paid to the executors, administrators, or assigns of the said [*covenantee*], the sum of 4000*l.* of lawful British money, within six calendar months next after the day of the death of the said [*covenantee*], with interest for the same after the rate of 5*l.* per centum per annum, to commence and be computed as and from the day of her death. AND WHEREAS the said [*covenantee*] duly made her last will and testament in writing, bearing date on or about the —— day of ——, And thereby, after reciting or taking notice of the said covenant contained in the said indenture of the —— day of ——, for payment of the sum of 4000*l.* and interest, did give and bequeath the said sum of 4000*l.*, and the interest thereon, so covenanted to be paid by the said [*covenantor*] as aforesaid, unto the said [T. B.], [*one trustee*], (by mistake therein called [L. B.]), and the said [*other*

Recital of a deed of covenant for payment of a sum of money;

—of the will of the covenantee;

trustee], their executors and administrators, *Upon trust to (invest and pay the dividends to the covenantor for life, and after his decease upon certain trusts in the will declared (a)*). And the said [*covenantee*] appointed [R. S.] to be the executor of her said will; and after the said sum of 4000*l.* and interest should be paid by the said [*covenantor*] to the trustees of her said will, then the testatrix appointed the said [*covenantor*] also to be an executor of her said will (*b*). And whereas the said [*covenantee*] made and published two codicils to her said will, which codicils did not affect the bequest contained in her said will of the said sum of 4000*l.* and interest, or the appointment of executors therein contained. And the said testatrix afterwards departed this life; and her said will and codicils have been duly proved by the said [R. S.] in the —— Court of ——. And whereas, the said [*trustees*] having required payment of the said sum of 4000*l.*, bequeathed to them by the will of the said [*covenantee*] as aforesaid, the said [*covenantor*], with the consent and approbation as well of the said [*executor*], as executor as aforesaid, as of the said [*trustees*], testified by their respectively executing these presents, did, on the —— day of ——, transfer, or cause to be transferred, into the names of the said [*trustees*], the sum of 573*l.* 11*s.* 4*d.* 3*l.* per Centum Consolidated Bank Annuities, which, according to the average market price of stock on that day, was of the value of 4000*l.* sterling, in lieu, satisfaction, and discharge of the said sum of 4000*l.* by the said indenture covenanted to be paid by the said [*covenantor*] to the executors, administrators, or assigns of the said [*covenantee*], and given and bequeathed as aforesaid, but without any interest for the same, such interest

10. BY EXECUTOR AND LEGATEES IN TRUST OF COVENANTEE.

—of two codicils;

—of a transfer of stock, adequate in value to the sum covenanted to be paid;

—retention of interest.

(*a*) Where the obligee or covenantee of a sum of money bequeaths to the obligor or covenantor a life interest in the debt, it is frequently intended that the principal shall not be raised during the life of the legatee; *but this ought always to be expressed*, for such an intention is not necessarily to be inferred from a mere gift of the interest, which gift it is clear would not exonerate the personal representatives of the obligee or covenantee from the duty of raising the principal on the maturity of the bond or covenant. In the present instance, indeed, the terms of the bequest shew that the testatrix had a distinct intention to postpone the calling in of the money.

Bequest of interest of debt to the debtor does not postpone the payment.

(*b*) This suspension of the debtor's executorship until the payment of the debt is obviously designed to prevent the legal discharge, which the appointment would otherwise effect. Vide ante, p. 795.

10. BY EXECUTOR AND LEGATEES IN TRUST OF COVENANTEE.

having with the consent and approbation of the said [*trustees*] and [*executor*], been retained by the said [*covenantor*], by virtue of the hereinbefore-recited bequest to him, as he doth hereby acknowledge, testify, and declare. NOW THESE PRESENTS WITNESS, that, in consideration of the said 5753*l.* 11*s.* 4*d.* 3*l.* per Centum Consolidated Bank Annuities, so transferred by the said [*covenantor*] to them the said [*trustees*], in satisfaction and discharge of the said sum of 4000*l.* as aforesaid, which transfer they do hereby respectively acknowledge, testify, and declare, They, the said [*trustees*], by these presents, Do, and each of them DOTH, release, exonerate, and discharge the said [*covenantor*], his heirs, executors, and administrators, of and from the said sum of 4000*l.*, by the said indenture covenanted to be paid as aforesaid, and so bequeathed to the said [*trustees*] by the will of the said [*covenantee*] as aforesaid, and of and from all actions, suits, and other proceedings, claims and demands, at law or in equity, which they the said [*trustees*], or either of them, now have or hath, or may bring, commence, or prosecute, or which they or either of them, or the executors or administrators of them or either of them, at any time or times hereafter, can or may bring, commence, or prosecute, have, claim, challenge, or demand, upon or against the said [*covenantor*], his heirs, executors, or administrators, by reason or on account of the said sum of 4000*l.*, or any part thereof, or the interest thereon, or on any part thereof.

Testatum. In consideration of the transfer of the stock, trustees release the covenantor from the principal and interest, and all actions, &c. in respect thereof.

Second testatum. AND THESE PRESENTS FURTHER WITNESS, that, in consideration of the said 5753*l.* 11*s.* 4*d.* 3*l.* per Centum Consolidated Bank Annuities, so transferred into the names of the said [*trustees*] by the said [*covenantor*] as aforesaid, the transfer whereof the said [*executor*] doth hereby acknowledge, testify, and declare (*c*); he the said [*executor*], as executor as aforesaid, DOTH, by these presents, remise, release, and for ever quit claim unto the said [*covenantor*], his heirs, executors, and administrators, the covenant contained in the said indenture of the —— day of ——, for payment of the sum of 4000*l.* and interest, as aforesaid; and all actions, suits, and other proceedings at law and in equity, claims and demands whatso-

Release by the executor of the covenantor.

(*c*) Or, for the sake of brevity, instead of the preceding passage in the text, say—

"for the considerations aforesaid."

ever, which the said [*executor*] now hath or may bring, commence, or prosecute, or which he, his executors or administrators, or the executors or administrators for the time being of the said [*covenantee*], deceased, can, shall, or may bring, commence, or prosecute, have, claim, challenge, or demand, against or upon the said [*covenantor*], his heirs, executors, or administrators, for, or by reason, or on account of the said covenant, or the said principal sum of 4000*l.* thereby secured, or any part thereof, or the interest thereon. AND THESE PRESENTS FURTHER WITNESS, that the said [*trustees*] do hereby acknowledge, testify, and declare, that they the said [*trustees*], with the consent and approbation of the said [*executor*], testified as aforesaid (*d*), and the survivor of them, and the executors, administrators, or assigns of such survivor, will and shall henceforth stand and be possessed of and interested in the said 5753*l.* 11*s.* 4*d.* 3*l.* per Centum Consolidated Bank Annuities, so transferred into and now standing in the names of the said [*trustees*] as aforesaid: *Upon trust,* to permit and suffer the said [*covenantor*] and his assigns to receive the dividends, interest, and annual proceeds from time to time arising therefrom, during the term of his natural life, for his and their own use and benefit, according to the tenor and effect of the hereinbefore-recited bequest contained in the said will of the said [*covenantee*] deceased. And from and after the decease of the said [*covenantor*], then, as to as well the said 5753*l.* 11*s.* 4*d.* 3*l.* per Centum Consolidated Bank Annuities, as the dividends, interest, and annual proceeds thenceforth arising therefrom; *Upon the trusts,* and for the intents and purposes expressed and declared in and by the hereinbefore-recited will concerning the said sum of 4000*l.* bequeathed by the said [*covenantee*], deceased, as aforesaid; And upon, to, or for no other trust, intent, or purpose whatsoever. IN WITNESS &c.

10. BY EXECUTOR AND LEGATEES IN TRUST OF COVENANTEE.

Further testatum.

Declaration of trust by trustees.

(*d*) The concurrence of the executor is necessary, not only for the purpose of releasing the covenant, but to consent to the monies covenanted to be paid going into the hands of the legatees in trust; which consent, of course, he would not give unless he had sufficient assets from other sources for the payment of debts. If there was any risk of the money being wanted for this purpose, the trustees might enter into a declaration similar to that which is contained in a former precedent, that the stock should continue liable to answer the claims of the testator's creditors. (Vide ante, p. 834).

As to the concurrence of the executor.

11. TO TRUSTEES ON THEIR TRANSFERRING A MORTGAGE TO THE CESTUI QUE TRUST.

11. RELEASE *and* COVENANT *of* INDEMNITY *by the* CESTUI QUE TRUST *under a* MARRIAGE SETTLEMENT, *on the Trustees' transferring a Mortgage Security, Part of the* TRUST FUNDS, *to the Releasor* (*a*).

Parties.

Recital of settlement made on the marriage of the deceased parents of the releasor;

THIS INDENTURE, made the —— day of ——, BETWEEN [*releasor*], of &c., of the one part, and [*releasees*], of &c., of the other part (*b*). WHEREAS, by indenture bearing date on or about the —— day of ——, and expressed to be made between &c., being the settlement made in contemplation of the marriage afterwards solemnized between the said [*father*] and [*mother*], It was declared and agreed that the said [*trustees*] should stand possessed of the sum of 12,000*l.* therein mentioned, when the same should be paid to them, *In trust* to invest the same in the funds or on real securities, and to apply and dispose of the interest thereon as therein directed, during the joint lives of the said [*father*] and [*mother*], and the life of the survivor of them; and, after the decease of such survivor, *Upon trust* to assign,

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Remarks upon the precedent in the text.

(*a*) In such a case as the present, the release is useful not only with a view to its immediate and primary object in discharging the trustees, but in explaining the real nature of the transaction between the cestui que trust and the trustees, which is disguised on the face of the deeds transferring the securities, in order to avoid disclosing the trusts. The transfer of mortgage, it will be collected from the recitals of the present deed, was expressed to be for a consideration equal to the amount of principal and interest monies due on it—a usual, though not a necessary precaution, as the deed might have stated that the property belonged to the transferee, without detailing the nature of the trusts.

Where releases should be made by indenture.

(*b*) It is more usual to make releases by deed-poll than by indenture; but where the instrument contains a covenant on the part of the releasee, the Editor has generally adopted the latter form, not because a covenant cannot be introduced into a deed-poll, even by a person not named in the exordium, (since it is clear that a covenantor need not, though a covenantee must, be a party to the deed of covenant, vide ante, p. 809), but because the frame of an indenture appears to be better adapted to an instrument containing mutual stipulations. Indeed, it is often advisable to make a release containing important recitals by indenture rather than by deed-poll, on account of the greater solemnity of the instrument, or, in other words, of its peculiar operation as an estoppel.

11. TO TRUSTEES ON THEIR TRANSFERRING A MORTGAGE TO THE CESTUI QUE TRUST.

transfer, and absolutely dispose of the said sum of 12,000*l.*, and the stocks, funds, and securities upon which the same or any part thereof should be invested, and to pay and dispose of the money arising by such sale or transfer, and the dividends, interest, and proceeds thereof which should have accrued from the death of the survivor of them the said [*father*], deceased, and [*mother*], until such sale or transfer, in the manner following, that is to say, In case there should be any child or children of the said [*father*], deceased, by the said [*mother*], then to pay and dispose of the money which should arise by such sale or transfer, to or among such one or more of the said children, whether son or daughter, or to or among any such child or children, at such days and times, and in such parts, shares, and proportions, and subject to such conditions, restrictions, charges, and limitations over, as the said [*father*], deceased, and [*mother*], the daughter, during their joint lives, should at any time or times, by any deed or writing, with or without power of revocation, sealed and delivered by them in the presence of and attested by two or more credible witnesses, direct or appoint. AND WHEREAS, by a deed-poll or instrument in writing, duly sealed and delivered by the said [*father*] and [*mother*], his wife, now respectively deceased, in the presence of and attested by two credible witnesses, bearing date on or about the —— day of ——, in the year ——, they the said [*father*] and [*mother*], his wife, in exercise of the power and authority in that behalf to them given and reserved, in and by their said marriage settlement as aforesaid, Did direct and appoint that the said sum of 12,000*l.* should, immediately after the death of the survivor of them the said [*father*] and [*mother*], his wife, be paid to and become the property of the said [*releasor*], their eldest son, his executors, administrators, and assigns, to and for his and their own use and benefit. AND WHEREAS, by a deed-poll or instrument in writing, under the hands and seals of the said [*father*] and [*mother*], his wife, indorsed on the hereinbefore-recited indenture of settlement, and bearing date on or about the —— day of ——, they the said [*father*] and [*mother*], his wife, in pursuance of a power in that behalf contained in the said settlement, did nominate and appoint the aforesaid [*releasees*] to be trustees in the place of the said [*trustees*], to execute the trusts in the same indenture of settlement. AND WHEREAS the said [*releasees*], having received the said

—appointment in favour of the releasor;

—appointment of new trustees;

—of part of the

11. TO TRUSTEES ON THEIR TRANSFERRING A MORTGAGE TO THE CESTUI QUE TRUST.

sum of 12,000*l.* mentioned in the said indenture of settlement, placed out the sum of 10,000*l.*, part thereof, at interest on a mortgage in fee of certain estates in the county of ——, belonging to the Most Noble ——, late Duke of ——, which were conveyed to them by indentures of lease and release, bearing date the —— and —— days of ——. AND WHEREAS, the said [*father*], deceased, survived the said [*mother*], his wife, and died on or about the —— day of ——, in the year ——, whereupon the said [*releasor*] became absolutely entitled to the said sum of 12,000*l.*, mentioned in the said indenture of settlement, under and by virtue of the said deed of appointment of the —— day of ——. AND WHEREAS, by indentures of lease and release and assignment, the release and assignment bearing even date with these presents, the said [*releasees*] have transferred, conveyed, and assigned the mortgage and the estates therein comprised, and the said sum of 10,000*l.* thereby secured, together with all interest due and to grow due for the same, unto the said [*releasor*], for and in consideration of the sum of 10,250*l.*, the amount of the principal and interest now due on the said mortgage, therein expressed to be paid by him to the said [*releasees*]. AND WHEREAS the said sum of 10,250*l.*, so expressed to be paid by the said [*releasor*] to the said [*releasees*], was not in fact paid by him to them; but such transfer, conveyance, and assignment as aforesaid were made to him in consideration of his being entitled to the said sum of 10,000*l.* and interest secured by the said mortgage, by the ways and means hereinbefore mentioned. NOW THEREFORE THIS INDENTURE WITNESSETH, that, in consideration of such transfer, conveyance, and assignment as aforesaid, and of all and singular other the premises, he the said [*releasor*] DOTH by these presents release, acquit, and discharge the said [*releasees*], and every of them, and the heirs, executors, and administrators of them and of every of them, and the lands, tenements, goods, and chattels of them and of every of them, from and of the said sum of 10,000*l.*, (part of the said sum of 12,000*l.*), so lent by them on mortgage as aforesaid, and to which he the said [*releasor*] became entitled as hereinbefore is mentioned; And from and of all interest accrued or become due for the same since the death of the said [*father*], deceased; *And also* from and of all and all manner of actions, suits, causes of action and suit, debts, accounts, reckonings, controversies, damages, claims,

trust money having been placed out on mortgage security;

—of death of prior tenants for life;

—that mortgage has been transferred to the releasor;

—that expressed consideration was not in fact paid.

Testatum.

In consideration of the premises cestui que trust releases the trustees from principal and interest monies transferred to him, and all actions, &c. in respect thereof.

and demands whatsoever, at law and in equity, which he the said [*releasor*] now hath or ever had, or which he, his executors or administrators, could or might, if these presents had not been made, have had, claimed, or demanded from, upon, or against the said [*releasees*] or any of them, or the heirs, executors, or administrators of them or of any of them, for or on account of the said sum of 10,000*l.* so lent on mortgage as aforesaid, or any part thereof, or any interest for the same, or for or by reason or means or on account of any act, transaction, matter, or thing whatsoever in anywise relating thereto. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the premises, the said [*releasor*] DOTH hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*releasees*], their executors, administrators, and assigns, that he the said [*releasor*], his heirs, executors, or administrators, will and shall from time to time, and at all times hereafter, effectually indemnify and save harmless them the said [*releasees*] and every of them, and the executors and administrators of them and of every of them, from and against all costs, damages, charges, and expenses whatsoever, on account or in consequence of any action or actions, or suit or suits, which shall or may hereafter be brought or prosecuted in their or any of their names or name by the said [*releasor*], his executors, administrators, or assigns, for the recovery of the said sum of 10,000*l.* and interest so assigned to him as aforesaid, or any part thereof, or in anywise relating thereto (*c*). IN WITNESS &c.

11. TO TRUSTEES ON THEIR TRANSFERRING A MORTGAGE TO THE CESTUI QUE TRUST.

Further testatum.

Covenant of indemnity by the releasor with the releasees, in consequence of their names being used in actions.

(*c*) This covenant is proper, though, even independently of express contract, the cestui que trust would be bound to indemnify the trustees against any risk which they may incur by their liability to the costs of actions brought by him in their names, under the power of attorney contained in the deed of transfer of mortgage. What trustees ought to do in cases such as the present, or in other instances where they are called upon to incur a liability of this nature, is a point often debated. Convenience certainly sometimes requires that they should permit the use of their names on having a personal indemnity; but if trustees are disposed to stand upon their strict legal privileges, it seems difficult to deny them the right of demanding to be discharged from every vestige of responsibility, before they relinquish their hold upon the trust property.

Remarks on the covenant of indemnity.

12. TO A TRUSTEE FOR SALE.

12. RELEASE *to a* TRUSTEE, *on having* SOLD *an* ESTATE *pursuant to the Trusts, and having* DISTRIBUTED *the Money among the Cestuis que Trust, (who are numerous), the Wife of the Trustee being one of the Cestuis que Trust. And* COVENANT *to* INDEMNIFY *the Trustee.*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*cestuis que trust, who are entitled to the trust monies in various proportions, of the first, second, third, and fourth parts*]; and [*trustee*], of the fifth part. (*Recite deed, creating the trust for sale, also the sale of the trust estate for the sum of* 1200*l.*, *and that the sum of* 1165*l.*, *the balance or residue of the purchase-money, was now divisible under the trust.*) AND WHEREAS the several persons, parties hereto of the first, second, third, and fourth parts, having examined and duly considered the nature and amount of their respective rights and interests, claims and demands, in respect of the said sum of 1165*l.* now remaining in the hands of the said [*trustee*], as the balance or residue of the price or consideration for the sale of the said hereditaments hereinbefore mentioned, have agreed, that the same sum of 1165*l.* shall be paid or divided among the several persons, and in the shares or proportions following; (that is to say), the sum of 125*l.*, part thereof, to the said [A. B.] and [C.], his wife; the sum of 80*l.*, other part thereof, to the said [D. E.] and [F.], his wife, (*and so on with respect to other sums*); and the sum of 350*l.*, the residue thereof, to the said [*trustee*] and [A.], his wife. AND WHEREAS the said [*trustee*], previously to the execution of these presents, in pursuance of the lastly-mentioned agreement, and with the privity, consent, and approbation of the said several persons, parties hereto of the first, second, third, and fourth parts, testified by their severally executing these presents, hath paid the sum of 125*l.* to the said [A. B.] and [C.], his wife, which they do hereby respectively acknowledge; (*Recite also the payment of the other sums to the other legatees, in like manner*). And the said [*trustee*], in pursuance of the said agreement, and with the privity, consent, and approbation of the said several other persons, parties hereto, (testified as aforesaid), hath retained for his own use

Recital that the cestuis que trust, having considered their respective interests, were entitled as follows;

—that the trustee for sale had paid the said parties their shares.

12. TO A TRUSTEE FOR SALE.

the sum of 350*l.*, being the remaining part of the said sum of 1165*l.* NOW THIS INDENTURE WITNESSETH, that they the said several persons, parties hereto of the first, second, third, and fourth parts, do hereby respectively testify and declare their consent to and approbation of the said sale and conveyance so by the said [*trustee*] made, as hereinbefore mentioned, of the said hereditaments comprised in the hereinbefore recited indentures of lease and release as aforesaid; *And also*, their consent to and approbation of the appropriation so by him the said [*trustee*] made of the said purchase-money or sum of 1200*l.* as aforesaid; And, in consideration of the said several sums of money hereinbefore mentioned to have been paid by the said [*trustee*], and of all and singular other the premises, they the said several persons, parties hereto of the first, second, third, and fourth parts, Do, and every of them DOTH, remise, release, and for ever quit claim unto the said [*trustee*], his heirs, executors, and administrators, *All* and all manner of actions and suits, causes of action and suit, controversies, differences, debts, duties, accounts, reckonings, sum and sums of money, and all other claims and demands whatsoever, both at law and in equity, which they the said several other persons, parties hereto of the first, second, third, and fourth parts respectively, or any of them, now have or hath, or which they or any of them, or the heirs, executors, or administrators of them or of any of them, or any person or persons on the account of them or of any of them, can, shall, or may have, claim, challenge, or demand upon or against the said [*trustee*], his heirs, executors, or administrators, for or by reason or on account of the several hereditaments and premises comprised in and released or expressed to be released by the said indenture of release of the —— day of ——, or the rents and profits thereof, or of any part thereof, or for, in respect, or by reason or on account of the sale and conveyance of the same hereditaments so made by the said [*trustee*], as hereinbefore mentioned, or the said sum of 1200*l.*, the purchase-money for the same, or any part thereof, or for or by reason or on account of the payment or division of the sum of 1165*l.* in manner aforesaid; or of the said [*trustees*] having retained the said sum of 350*l.* as aforesaid; or for, or by reason, or on account of any act, matter, or thing in anywise relating to the premises or any of them. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of all

Testatum.

Cestuis que trust testify their consent to the said sale,

and also their consent to the said payments;

and, in consideration of the said sums,

they release, and for ever quit claim,

all actions, &c.

Further testatum.

12. TO A TRUSTEE FOR SALE.

Parties of the 1st, 2nd, 3rd, and 4th parts, (except married women), covenant to indemnify the trustee

and singular the premises, the said parties hereto of the first, second, third, and fourth parts (except such of the said parties as are under coverture) do hereby, for themselves jointly and severally, and for their respective heirs, executors, and administrators, covenant and agree with the said [*trustee*], his heirs, executors, and administrators, that they the said covenanting parties, or some or one of them, the heirs, executors, or administrators of them or of some or one of them, will or shall, from time to time and at all times hereafter, save, defend, and keep harmless and indemnified the said [*trustee*], his heirs, executors, and administrators, and every of them, and his and their lands and tenements, goods and

from all actions.

chattels, of, from, and against all actions, suits, and other proceedings, both at law and in equity, which can, shall, or may, at any time or times hereafter, be brought, had, commenced, or prosecuted against the said [*trustee*], his heirs, executors, or administrators; and of, from, and against all costs, charges, damages, and expenses which he or they can, shall, or may bear, pay, sustain, expend, be at, or be put unto, for, by reason, or on account of the sale and conveyance of the said messuages, lands, tenements, and hereditaments comprised in the said indenture of release of the —— day of ——, so made by the said [*trustee*], as hereinbefore mentioned, or for, or by reason, or on account of the said [*trustee*] having received the said purchase-money or sum of 1200*l.*, or his having paid or applied the same, or any part thereof, in manner hereinbefore mentioned. IN WITNESS &c.

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13. RELEASE *of* LANDS *from a* REDEEMABLE ANNUITY, *and* SURRENDER *of a* TERM *created for securing it* (*a*). (*By Indorsement on the Annuity Deed*).

13. RELEASE OF ANNUITY AND SURRENDER OF TERM.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN the within-named [*releasor*], of the first part; the within-named [*surrenderor*], of the second part; and the

Stamp.

(*a*) Conveyances on the redemption or re-purchase of a redeemable annuity or rent-charge are expressly exempted from the ad valorem duty imposed on conveyances on the sale of any property, by stat. 55 Geo. 3, c. 184, s. 31.

within-named [*releasee*], of the third part. WHEREAS the said [*releasee*] is desirous to redeem or re-purchase the annuity or yearly rent-charge of £——, granted and secured by the within-written indenture, pursuant to the power therein contained, and hath given to the said [*releasee*] the requisite notice in writing in that behalf, and paid to him all arrears of the said annuity or yearly rent-charge up to and until and inclusive of the day of the date of these presents, as he the said [*releasor*] doth hereby acknowledge. NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, and of the sum of £—— sterling to the said [*releasor*] in hand paid by the said [*releasee*], upon or immediately before the execution of these presents, (the receipt of which sum of £——, in full payment and satisfaction of the price or consideration-money for the redemption or re-purchase of the aforesaid annuity or yearly rent-charge of £——, conformably to the proviso in that behalf in the within-written indenture contained, the said [*releasor*] doth hereby acknowledge, and from the same redemption or re-purchase-money doth acquit, release, and for ever absolutely discharge the said [*releasee*], his heirs, executors, administrators, and assigns), He the said [*releasor*] DOTH, by these presents, release, acquit, exonerate, and for ever absolutely release and discharge the said [*releasee*], his heirs, executors, administrators, and assigns; *And also* all the messuages, farms, lands, tenements, and all and singular other the hereditaments by the within-written indenture charged with the aforesaid annuity or yearly rent-charge, or expressed and intended so to be, with their appurtenances, and all other the real estate, and also all the personal estate of the said [*releasee*] from the said annuity or yearly rent-charge of £——, granted and secured as aforesaid, and all arrears and future payments thereof, and from the powers and remedies by entry and distress, and perception of the rents and profits, or otherwise, by the within-written indenture given and reserved for the purpose of securing the regular payment of the same annuity or yearly rent-charge, and the covenant in the within-written indenture contained on the part of the said [*releasee*] for payment of the same annuity or yearly rent-charge, and from all actions, suits (*b*),

13. RELEASE OF ANNUITY AND SURRENDER OF TERM.

Recital that releasee is desirous to re-purchase annuity, and has paid all arrears.

Testatum.

In consideration of redemption money, grantee releases to grantor.

(*b*) If the annuity is secured by a judgment, satisfaction should be entered.

13. RELEASE OF ANNUITY AND SURRENDER OF TERM.

costs, charges, damages, expenses, claims, and demands whatsoever, for or in respect of or on account of the said annuity or yearly rent-charge of £——, or any part thereof, or such arrears or future payments thereof as aforesaid, or any part thereof respectively, or otherwise in relation thereto.

Covenant by releasor that he has done no act by means whereof he is prevented from releasing.

And the said [*releasor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and declare with and to the said [*releasee*], his heirs and assigns, that he the said [*releasor*] hath not at any time heretofore made, done, executed, or permitted any act, matter, or thing whatsoever, by means whereof he is prevented or incapacitated from releasing and discharging the said [*releasee*], his heirs, executors, administrators, and assigns, and his and their said real and personal estate, from the payment of the said annuity or yearly rent-charge of £——, in manner aforesaid, and according to the true intent and meaning of these presents, or by means whereof the said —— and hereditaments by the within-written indenture charged therewith as aforesaid, or expressed so to be, or any part thereof, are or is impeached, charged, or prejudicially affected in any manner howsoever.

Further testatum.

AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the premises, and also in consideration of 10*s.* to the said [*trustee*] already paid by the said [*releasee*], he the said [*trustee*], at the request and by the direction and appointment of the said [*releasor*], (testified by his executing these presents), Doth, by these presents, assign, surrender, and yield up (*c*) unto the said [*releasee*], his heirs, and assigns, *All those* the messuages, farms, lands, tenements, hereditaments, and premises, by the within-written indenture demised to the said [*trustee*], his executors, administrators, and assigns, for the within-mentioned term of —— years, Upon the trusts therein expressed, for further and better securing the aforesaid annuity or yearly rent-charge, with their appurtenances; And all the estate, right,

Trustee, by the direction of the releasor and releasee, surrenders

all the estate, &c.

Where the term should be kept on foot.

(*c*) It rarely happens, that, where a person pays off an incumbrance of his own creation, he keeps on foot the term for years limited for securing it: and the preservation of the term cannot be recommended unless the owner were about to sell or mortgage the property; in which case, (especially if the merger would have the effect of letting in dower or judgment debts, against which the term in the hands of a purchaser or mortgagee would afford protection), it would be advisable to vest the term in a trustee for the owner, to attend the inheritance. The precedent in the text would then be varied, ut ante, p. 140.

title, trust, interest, term of years now to come and unexpired, property, claim, and demand whatsoever, at law and in equity, of him the said [*trustee*], in, to, or out of the said —— and hereditaments hereby surrendered as aforesaid; *To the intent*, that the residue now to come and unexpired of the said term of —— years, created by the within-written indenture in the said —— and hereditaments, hereby surrendered as aforesaid, and all other the estate, term, and interest of the said [*trustee*] therein, may be merged and extinguished in the freehold and inheritance of the same premises. (*Covenant by trustee with surrenderee that he has not encumbered, ut ante, p.* 106). In witness &c.

13. RELEASE OF ANNUITY AND SURRENDER OF TERM.

To the intent that term may be merged.

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14. RELEASE *and* Indemnity *by the* Members *of a* Friendly Society *to the Administratrix of a* deceased Trustee, distributing *a* Fund *on its* Dissolution.

14. BY MEMBERS OF A FRIENDLY SOCIETY.

THIS INDENTURE, made the —— day of ——, Between the several persons whose names and seals are subscribed and affixed to these presents, (other than the person hereinafter named as the party of the second part), of the first part; and [*administratrix*], of &c., of the second part: Whereas, in or about the year ——, a society was formed and established at ——, conformably to the provisions of an act of Parliament made and passed in the thirty-third year of the reign of King George the Third, intituled, "An Act for the Encouragement and Relief of Friendly Societies," for the purpose of raising a stock or fund, (*state the object of the society*), according to certain articles, rules, and regulations, intituled, (*insert title*), and duly inrolled at the general quarter sessions of the peace for the said county of ——, holden by adjournment at ——, in the said county, on the —— day of ——. And whereas part of the money constituting the stock or fund of the said society was, on or about the —— day of ——, invested in the purchase of 300*l.* 3*l.* per Centum Consolidated Annuities, in the name of [*deceased trustee*], one of the members thereof. And whereas the said [*deceased trustee*] died in or about the

Parties.

Recital of formation of society;

—investment of fund in the name of deceased trustee;

—his will and death;

14. BY MEMBERS OF A FRIENDLY SOCIETY.

year ——, having duly made and published his last will and testament in writing, bearing date the —— day of ——, and thereby appointed his brother [*executor*], his sole executor, and the said [*administratrix*], his residuary legatee; and the said [*executor*] duly proved the said will in the Court of the Archdeacon of ——. And whereas the said [*executor*] died in the year ——, having, by his last will and testament, bearing date the —— day of ——, appointed [*executors*] executors thereof, who have duly proved the same will in the Archdeaconry Court aforesaid. And whereas, in or about ——, the said society was dissolved and determined by and with the consent and agreement of the said several persons parties hereto, of the first part, they being then and now the only members of the said society, and the only persons entitled to any benefit therefrom or the funds thereof. And whereas, the governor and company of the Bank of England (*a*) having refused to transfer the said 300*l.* 3*l.* per Centum Consolidated Annuities, under the probates aforesaid, the said [*administratrix*] (upon the request of the said several persons parties hereto of the first part), lately applied for and obtained letters of administration of the estate and effects of the said [*deceased trustee*], deceased, with his said will annexed, from the Prerogative Court of the Archbishop of Canterbury; And the said [*administratrix*], at the like request of the said several persons parties hereto of the first part, hath sold the said 300*l.* 3*l.* per Centum Consolidated Annuities for the sum of £——, having previously received a dividend thereon amounting to the sum of £——, which two sums amount together to the sum of £——, and after deducting the sum of £—— therefrom for the expenses attending the said sale and the said administration, and also the costs and expenses attending the preparation and execution of these presents, the sum of £—— remained in the hands of the said [*administratrix*]. And whereas the said several persons parties hereto of the first part have agreed that the said sum of £—— shall be divided amongst them in the proportions mentioned in the schedule hereunder written, and have requested the said [*ad-*

—death of executor;

—dissolution of society;

—administration with the will annexed to the deceased trustee;

—agreement to divide fund, and release and indemnify administratrix;

(*a*) The much debated question, whether the Bank of England is entitled to withhold from an executor a transfer of stock specifically bequeathed to another, has been decided in favour of the executor. *Franklin* v. *Bank of England*, 9 B. & Cr. 156. See *S. C.*, 1 Russ. 589.

ministratrix] to pay the same accordingly, which she hath consented to do on being released and indemnified in manner hereinafter mentioned. AND WHEREAS the said [*administratrix*] hath this day paid to the said several persons parties hereto of the first part the several sums set against their respective names in the schedule hereunder written, in full for their respective shares of the said sum of £——, as they do hereby respectively acknowledge, testified by their respectively executing these presents. NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, they the said several persons parties hereto of the first part DO, and each and every of them DOTH, by these presents, acquit, release, and for ever discharge the said [*administratrix*], her executors and administrators, of and from the said 300*l.* 3*l.* per Centum Consolidated Annuities, and the monies produced by the sale thereof, and all dividends and income thereof, and all actions, suits, accounts, reckonings, claims, and demands whatsoever, of them the said several persons, parties hereto of the first part, and of each and every of them, and their respective executors and administrators, on account or in respect of the same, or of any matter, cause, or thing in anywise relating thereto. AND the said several persons parties hereto of the first part do hereby jointly, for themselves, their heirs, executors, and administrators, and each of them severally, separately, and apart from the others of them, doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*administratrix*], her executors and administrators, That they the said several persons parties hereto of the first part respectively, and their respective heirs, executors, or administrators, will and shall, at his or their own costs and charges, from time to time and at all times hereafter, well and effectually save harmless and keep indemnified the said [*administratrix*], her executors and administrators, and her and their estate and effects, and the estate and effects of the said [*deceased trustee*], deceased, of, from, and against all and all manner of actions, suits, payments, losses, costs, charges, damages, claims, and demands whatsoever, which shall or may be commenced or prosecuted against, or paid, incurred, borne, sustained, or made by the said [*administratrix*], her executors or administrators, or any or either of them, by reason or on account of such sale and transfer of the said 300*l.* 3*l.* per Centum Consolidated An-

14. BY MEMBERS OF A FRIENDLY SOCIETY.

—payment of shares.

Testatum.

In consideration of premises, parties of the first part release administratrix.

Covenant to indemnify.

14. BY MEMBERS OF A FRIENDLY SOCIETY.

nuities, and such payment and application of the produce thereof, or any part of the same respectively as aforesaid, or by reason or on account of any other cause, matter, or thing whatsoever in anywise relating to the premises. IN WITNESS &c.

SCHEDULE TO WHICH THE PRECEDING INDENTURE REFERS.

15. ANNUITANT-DEVISEES AND DOWRESS TO A PURCHASER.

15. RELEASE *of Lands from two* ANNUITIES *created by* WILL, *one of which was* REVERSIONARY, *and the other was vested in one of the Releasors* IN TRUST *for the other; and also from* DOWER, *to a* PURCHASER *of* PART *of the Testator's Estate.* (VARIATION *where the Release is of a* GROSS SUM *a*)

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*trustee*], of &c., of the first part; [*cestui que trust*], of &c., of the second part; [*reversionary annuitant*], of &c., of the third part; and [*purchaser*], of &c., of the fourth part.

Recital of will devising annuities;

WHEREAS [*testator*], late of ——, by his last will and testament in writing, bearing date on or about the —— day of ——, (amongst divers bequests and legacies therein contained), gave to the said (*b*) [*trustee*], his executors and administrators, during the life of his the said testator's wife, [*cestui que trust*], an annuity of 300*l.*, commencing from the time of his decease, In trust to pay the same by equal quarterly payments to the said [*cestui que trust*], for her separate use as therein mentioned. And the said testator thereby also gave to the said [*reversionary annuitant*], by the description of (*description*), an annuity for her life of 200*l.*, to commence from the time of the death of his said wife, and to

(*a*) If the release is simply of a gross sum, the only parties will be the legatee of the one part, and the purchaser of the other part.

(*b*) If the release is of a gross sum, say—

Variation where the release is of a gross sum.

"to the said [*legatee*] the sum of 300*l.*, to be payable at the expiration of one year from the time of his decease, with interest at the rate of 4*l.* per centum per annum from such decease."

15. ANNUITANT-DEVISEES AND DOWRESS TO A PURCHASER.

be paid quarterly afterwards during the lifetime of the said [*reversionary annuitant*]. And after certain other devises and bequests therein contained, the said [*testator*], deceased, devised and bequeathed all the rest, residue, and remainder of his estate and estates, real and personal, whatsoever and wheresoever, charged with the payment of the said annuities (*c*) (*d*), to the said [*trustees for sale*], their heirs, executors, and administrators, In trust, with all convenient speed after his death, to collect in, sell, and dispose of all his the said testator's said estate and estates, and to convert the same into money. And the said [*testator*], deceased, thereby declared, that the receipt of the said [*trustees*], their heirs, executors, administrators, and assigns, for the monies which should come to their hands, should effectually discharge the person or persons paying the same from seeing to the application thereof. And the said testator afterwards departed this life on the —— day of ——, without revoking or varying his said will, which soon after his decease was proved by the executors therein named in the proper ecclesiastical court. AND WHEREAS, by indenture, the release bearing even date with these presents, and expressed to be made between the said [*trustees for sale*], of the first part; the said [*purchaser*], of the second part; and [*dower trustee*], of &c., (a trustee nominated by and on the behalf of the said [*purchaser*],) of the third part; in consideration of the sum of £——, in the said indenture of release mentioned to be paid by the said [*purchaser*] to the said [*trustees for sale*], They the said [*trustees for sale*] did grant, bargain, sell, alien, release, and confirm unto the said [*purchaser*] and his heirs, *All* (*parcels*), &c., with their and every of their appurtenances, (being part of the real estate lately belonging to the said [*testator*], deceased), To hold the same unto the said [*purchaser*] and his heirs, (*to the ordinary uses to prevent dower*) (*e*). AND WHEREAS, at the time of the

—release, conveying the lands intended to be released to the releasee;

—agreement for

(*c*) "legacy or sum of 300*l.*" Variation.

(*d*) This amounts to an *equitable* charge only, and therefore the doctrine governing rent-charges, (vide ante, p. 815), which precludes the releasing of *part* of the lands, does not apply. Still it may be proper for the releasor to satisfy himself that the residue of the lands charged has not been dealt with in such a manner as to preclude him from recovering more than a proportion.

(*e*) There is no apparent reason why the annuitants should not have joined in this deed, as the annuities were devised by the same will which

15. ANNUITANT-DEVISEES AND DOWRESS TO A PURCHASER.

execution of the said indenture of release, It was agreed that the said (*f*) [*cestui que trust*] and [*reversionary annuitant*], should respectively release the said [*purchaser*], his heirs and assigns, and the said hereditaments and premises hereinbefore described, of and from the payment of the said two annuities (*g*) of 300*l.* and 200*l.*, in manner hereinafter mentioned (*h*). NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement (*i*), he the said [*trustee*], (at the request and by the direction of the said [*cestui que trust*], testified by her executing these presents), and also the said [*cestui que trust*], Do, and each of them DOTH, by these presents, acquit, release, and discharge the said [*purchaser*], his heirs and assigns, and the said hereditaments, and all and singular other the premises, with their and every of their appurtenances comprised in the above-recited indenture of release, of and from the payment of the said (*h*) annuity or yearly sum of 300*l.*, so given and bequeathed to or in trust for her the said [*cestui que trust*] during her life, in and by the hereinbefore-in-part-recited will of the said [*testator*], deceased, as aforesaid; And of and from all arrears thereof; And of and from all and all manner of action and actions, suit and suits, cause and causes of action and suit, claims, pretensions, and demands whatsoever, for or on account thereof, or in anywise relating thereto; And of and from all dower and thirds at common law, and right and title

release of purchased estate from annuities.

Testatum.

Trustee and cestui que trust release the purchaser and the purchased hereditaments

from payment of the annuity, and all arrears, and all actions, &c.

and from dower.

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created the trust for sale, so that nearly the same recitals would have applied to both. Sometimes, for the sake of simplicity, and even of brevity, it is advisable to effect distinct objects of this kind by separate deeds.

(*f*) If the release is of a gross sum, say—

Variation where the release is of a gross sum.

"[*legatee*] should release" &c.

(*g*) "legacy."

(*h*) The suggestion made ante, p. 826, as to the legacy duty, applies to this precedent.

(*i*) If the release is of a gross sum by the beneficial legatee, say—"he the said [*legatee*] DOTH, by these presents, remise" &c.

(*h*) "legacy or sum of 300*l.*, so given and bequeathed to her the said [*legatee*] in and by the above-recited will of the said [*testator*], deceased, as aforesaid; And of and from all interest in respect thereof, and of and from all and all manner of actions," &c.

15. ANNUITANT-DEVISEES AND DOWRESS TO A PURCHASER.

of dower and thirds at common law, and all other claims and demands of her the said [*cestui que trust*], of, in, to, or out of the same hereditaments and premises, or any part thereof (*l*). AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said agreement, she, the said [*reversionary annuitant*], DOTH, by these presents, remise, release, and discharge the said [*purchaser*], his heirs and assigns, and the said hereditaments, and all and singular other the premises comprised in the above-recited indenture of release, with their and every of their appurtenances, of and from the payment of the said annuity or yearly sum of 200*l.*, given and bequeathed to her the said [*reversionary annuitant*] after the decease of the said [*cestui que trust*], during the life of her the said [*reversionary annuitant*], in and by the above-recited will of the said [*testator*], deceased, as aforesaid; And of and from all and all manner of actions, suit and suits, cause and causes of action and suit, claims, pretensions, and demands, whatsoever, for or on account thereof, or in anywise relating thereto (*m*). IN WITNESS &c.

Further testatum.

Reversionary annuitant releases the purchaser and the purchased hereditaments

from the reversionary annuity, and all actions, &c.

(*l*) Some persons would add, from abundant caution, a proviso to the following effect:—

"PROVIDED ALWAYS, and it is hereby declared, that nothing herein contained shall discharge, prejudice, or affect any lien or claim which the said [*trustee*], as such trustee as aforesaid, or the said [*cestui que trust*], or either of them, now have or hath, or at any time or times hereafter shall or may have against any part or parts of the estate and effects of the said [*testator*], deceased, charged with the payment of the said annuity of 300*l.* in and by his said will, other than and except the said hereditaments hereinbefore released from the payment of the said annuity as aforesaid, anything hereinbefore contained, or any rule of law or equity to the contrary notwithstanding."

Variation where a restrictive proviso is added.

This proviso, it is scarcely necessary to say, is useless; for the law is not so absurd as to hold that a man who releases part thereby evinces an intention to discharge the whole, though such in another instance (vide ante, p. 815) is the involuntary consequence of his act, under the operation of a technical principle of law.

(*m*) If so intended, add a power similar to the former.

16. REMAINDER-MAN TO TENANT FOR LIFE, FOR WASTE.

16. RELEASE, *by* REMAINDER-MAN, *of* ACTIONS *on account of* WASTE COMMITTED *by* TENANT *for* LIFE, *the Releasor's Father.*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*releasor*], of &c., of the one part, and [*releasee*], of &c., of the other part. WHEREAS, &c. (*Recite marriage settlement of the manors of —— and ——, and of divers hereditaments in the parishes of —— and —— (a), in strict settlement*).

Recital of marriage settlement;

—that releasor is the only son of the marriage;

—inrolled assurance for barring the entail;

AND WHEREAS the said [*releasor*] is the first and only son of the said [*releasee*], (party hereto), and Dame [*wife*], his wife; and he attained the age of twenty-one years on or about the —— day of —— now last past. AND WHEREAS, by indenture of release, dated on or about the —— day of —— last, expressed to be made between the said [*releasee*], of the first part; the said [*releasor*], of the second part; and [*grantee to uses*], of &c., of the third part; (and inrolled in the high Court of Chancery on the —— day of —— last) the manors, and other hereditaments hereinbefore mentioned, and comprised in the indentures of lease and release hereinbefore recited, have been and are intended to be assured or limited to the use of the said [*releasee*], (party hereto), and his assigns, for the term of his natural life, with remainder to the use of the said [*releasor*], and of his heirs and assigns, for ever, discharged of all estates tail of the said [*releasor*], and all estates, rights, titles, interests, and powers, to take effect after the determination or defeazance of the same estate tail.

—of waste committed by the releasee, the tenant for life;

AND WHEREAS the said [*releasee*] (party hereto) did some time since, with the privity and consent of the said [*releasor*], his son, fell and cut down considerable quantities of timber and other trees, standing and being in or upon the lands and hereditaments comprised in the said indentures of lease and release; and did sell and dispose of the same, and apply the produce thereof to or for his own use.

—agreement for release.

AND WHEREAS, for the purpose of discharging the said [*releasee*] (party hereto) from all actions, claims, and demands, whatsoever, for or in respect of the timber and other trees so felled

(*a*) It would not be necessary, in such a case, to transcribe the description of the parcels at length, which is probably long.

and cut down by him as aforesaid, and the produce thereof, the said [*releasor*] hath determined and agreed to execute the release hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the natural love and affection which the said [*releasor*] hath and beareth for and towards the said [*releasee*], (party hereto), his father, he the said [*releasor*], for himself, his heirs, executors, and administrators, DOTH by these presents fully and absolutely acquit, release, and for ever discharge the said [*releasee*], (party hereto), his executors, administrators, and assigns, and all the estate and effects whatsoever, of him, them, and every of them, of and from all and all manner of forfeitures, actions, suits, causes of action and suit, accounts, reckonings, claims, and demands, whatsoever, at law and in equity, or otherwise howsoever, for or by reason or on account of his, the said [*releasee*], (party hereto), having felled and cut down, sold and disposed of such timber and trees, or any part thereof, or for or by reason or on account of any matter, cause, or thing, in anywise relating to the premises. IN WITNESS &c.

16. REMAINDER-MAN TO TENANT FOR LIFE, FOR WASTE.

Testatum.

Remainderman, in consideration of natural love and affection, releases to tenant for life, all forfeitures, actions, &c.

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17. COVENANT *by the* JOINTRESS-OWNER *of a* RENT-CHARGE *with the* PURCHASER *of part of the Lands not to* DISTRAIN *or* ENTER (*a*).

17. COVENANT BY OWNER OF RENT-CHARGE NOT TO DISTRAIN OR ENTER.

THIS INDENTURE, made the —— day of ——, BETWEEN [*jointress*], of &c., of the first part; [*vendor*], of &c., of the second part; and [*purchaser*], of &c., of the third part.

Parties.

(*a*) A release of part of the lands, out of which a rent-charge issues, has the effect of extinguishing the rent; (ante, p. 815); and, therefore, where it is intended to exonerate part only of the lands, the utmost that the rent-owner can do, consistently with the preservation of his claim on the remainder of the lands, is to give the purchaser a covenant not to distrain or enter on his portion of the lands; the breach of which would subject him (the covenantor) to an action for damages. If it did more, i. e., if it operated as an absolute bar to the distress and entry, it would be attended with the consequence of extinguishing the rent, in the same manner as an instrument formally and technically framed as a release. The effect of the covenant being merely to entitle the covenantee to damages, in case of a distress or entry being made, it would be equally effi-

Remarks upon the precedent in the text.

17. COVENANT BY OWNER OF RENT-CHARGE NOT TO DISTRAIN OR ENTER.

Recital of deed, creating the jointure rent-charge;

—of preliminary agreement to covenant, as after mentioned.

(*Recite marriage settlement, by which lands were conveyed to the use of A. for life, with remainder, to the intent that the covenantor (the wife) should receive a yearly rent-charge of* 300*l. during her life, with powers of distress and entry, with remainders over; recite also the solemnization of the marriage, and the death of A., and that the persons entitled to the lands subject to the rent-charge had sold part of the estate to the covenantee; and that, by indenture of release of even date, the property in question had been conveyed for an estate in fee-simple to the covenantee*). AND WHEREAS the said [*jointress*] hath, upon the application and request of the said [*vendor*], (testified by his sealing and delivering these presents), agreed not to distrain or enter upon the said —— and hereditaments purchased by and conveyed to the said [*purchaser*] as aforesaid, with their appurtenances, for the purpose of enforcing the payment and recovery of the said annual sum of 300*l.*, being satisfied that the other hereditaments charged therewith are an ample security for the same.

Testatum.

Jointress covenants not to distrain or enter on the lands of the purchaser.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, the said [*jointress*] DOTH, for herself and her heirs, executors, administrators, and assigns, covenant and agree with the said [*purchaser*], his heirs and assigns, in manner following, that is to say (*b*),

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cient, and perhaps more correct, if framed simply as a covenant for indemnity, according to the variation introduced in the following note:—

[It has been suggested that the exoneration of part of the lands charged with a rent may be effected by an equitable release, accompanied by an express declaration that the release shall not operate at law. Martin's Recital Book, p. 367. But a covenant not to distrain or enter amounts to a release in equity, and has, besides, the advantage of giving the purchaser a remedy at law. It would be a prudent precaution to indorse a memorandum of the deed of covenant on the deed creating the rent-charge.]

[Another course is to assign the rent-charge to trustees in trust to raise it out of the lands which are not to be exonerated, exclusively of the lands sold. This may add a little to the security of the purchaser; but the advantage gained is merely an equivalent for the inconvenience and expense incident to the arrangement. As, however, the expedient is sometimes resorted to, a form is given infra, p. 870.]

(*b*) If the covenant is a covenant for indemnity only, as suggested in the note supra, proceed as follows:—

Variation where the covenant is framed as a covenant for indemnity.

" that she, the said [*jointress*], her heirs, executors, and administrators, will and shall, from time to time and at all times hereafter, effectually save harmless and keep indemni-

that she the said [*jointress*] will not nor shall, her executors, administrators, or assigns, at any time hereafter, in case of non-payment of the said annual sum of 300*l.*, or any part thereof, distrain or enter on, or cause or procure any distress or entry to be made on, the said manor and other hereditaments of and in —— aforesaid, or any of them, or any part or parts thereof; or bring, commence, carry on, or prosecute any action or actions, suit or suits, or other proceeding or proceedings, against the tenants or occupiers for the time being of the same manor and other hereditaments, or any of them, or any part or parcel thereof, for recovering, obtaining, or compelling payment of the said annual sum of 300*l.*, or any part thereof, or the rents and profits of the said manor and other hereditaments, or any part or parcel thereof, or anywise molest, interrupt, or disturb the said [*purchaser*], his heirs or assigns, or his or their under-tenants, in the possession or enjoyment of the said manor and other hereditaments, or any of them, or any part or parcel thereof, or in the perception of the rents, issues, and profits thereof; *And* that she the said [*jointress*] hath not, at any time heretofore, made, done, committed, or executed, or knowingly or willingly suffered any act, deed, matter, or thing, whatsoever, whereby or by means whereof any person or persons other than the said [*jointress*] shall be enabled to distrain and enter on the said manor and other hereditaments to which the covenant hereinbefore contained extends. In witness &c. (*c*).

17. COVENANT BY OWNER OF RENT-CHARGE NOT TO DISTRAIN OR ENTER.

Also that she has not encumbered.

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fied the said [*purchaser*], his appointees, heirs, or assigns, or other the owners or occupiers for the time being of the said —— and other hereditaments conveyed and assured to the said [*purchaser*], as hereinbefore recited, from and against all losses, costs, charges, damages, and expenses, whatsoever, which he or they shall or may incur or be put unto by reason or on account of any distress or entry being levied or made in or upon the said hereditaments or any part thereof, or any other proceeding or proceedings, either at law or in equity, being had or taken to enforce or compel the payment of the said annual sum of 300*l.* so limited to the said [*jointress*] during her life, as hereinbefore recited, or in anywise in relation thereunto. In witness" &c.

(*c*) In the draft from which the precedent in the text was taken, a proviso was inserted, declaring that nothing therein contained should prejudice the jointress's claim upon the rest of the property; but it was

17. COVENANT BY OWNER OF RENT-CHARGE NOT TO DISTRAIN OR ENTER.

omitted, because it appeared not to be framed consistently with sound principles of law; for it assumes two false positions—*first*, that the covenant operates as a release of the annuity; and, *secondly*, that, being such, a proviso of this nature would prevent it from discharging the residue, or, to speak more accurately, from extinguishing the rent. The contrary, it is well known, is in both instances the fact.

18. ASSIGNMENT OF ANNUITY TO TRUSTEES, IN TRUST TO EXONERATE PURCHASER OF PART OF THE LANDS CHARGED.

18. [EQUITABLE RELEASE *of* PART *of* LANDS CHARGED *with an* ANNUITY, *by* ASSIGNMENT *of the* RENT-CHARGE *to* TRUSTEES *in Trust to levy the Rent exclusively from the other Lands charged.*

THIS INDENTURE, made the —— day of ——, BETWEEN [*annuitant*], of &c., of the first part; [*purchaser*], of &c., of the second part; and [*trustees*], of &c., of the third part. WHEREAS (*recite grant of annuity charged on the hereditaments hereinafter described, and on other hereditaments* (*a*)). AND WHEREAS by indenture of release, bearing even date with these presents, and made &c., for the consideration therein mentioned, ALL &c., (*parcels to be exonerated*), with the appurtenances, were released or otherwise assured to uses in favour of the said [*purchaser*], his appointees, heirs, or assigns, for ever. AND WHEREAS, upon the treaty for the purchase of the hereditaments hereinbefore described by the said [*purchaser*], it was agreed between him and the said [*annuitant*], that the said annuity or yearly rent-charge should be granted or assigned to the said [*trustees*], their executors, administrators, and assigns, upon the trusts hereinafter declared. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, the said [*annuitant*] DOTH hereby grant and assign unto the said [*trustees*], their executors, administrators, and assigns, ALL THAT the said annuity or yearly rent-charge of £—— so

Parties.

Recital of annuity deed, sale of part of the lands charged;

—agreement to assign annuities to trustees.

Testatum.

Annuitant assigns annuity to trustees.

(*a*) [If the annuity was secured by a term, the term may have been either surrendered, as to the purchased premises, or assigned to a trustee for the purchaser; or the term in the whole of the lands might be assigned by the present deed to the trustees of the annuity, in trust, as to the purchased lands, for the purchaser.]

[The grantor of the annuity is not made a party to this deed, because the purchase deed will contain sufficient evidence of his concurrence in the arrangement.]

granted to the said [*annuitant*] as aforesaid, And all arrears, (if any), and also all future payments thereof, and all and every the powers and remedies for recovering or enforcing payment thereof, and all the estate, right, title, interest, property, claim, and demand, whatsoever, both at law and in equity of him the said [*annuitant*] in, to, or in respect of the said annuity or rent-charge, or in, to, or upon the said hereditaments so charged therewith as aforesaid, or any part thereof respectively. TO HAVE, HOLD, RECOVER, RECEIVE, AND TAKE the said annuity or rent-charge of £——, and other the premises intended to be hereby granted or assigned unto the said [*trustees*], their executors, administrators, and assigns, *Upon trust* that they the said [*trustees*], and the survivor of them, his executors and administrators, and their or his assigns, do and shall, from time to time henceforth during the continuance of the said annuity or rent, levy, raise, receive, and take the same annuity or rent-charge exclusively from and out of such of the hereditaments charged therewith as are not hereinbefore particularly described, and were not so conveyed or intended to be conveyed to uses in favour of the said [*purchaser*], his appointees, heirs, or assigns, as aforesaid, so and to the intent that the last-mentioned hereditaments, with their appurtenances, may at all times henceforth in equity (but not at law) be fully and absolutely exonerated, freed, and discharged from the said annuity or rent-charge, and all liability in respect thereof; And, subject to the trust aforesaid, do and shall stand and be possessed of and entitled to the said annuity or rent-charge and premises intended to be hereby assigned, *In trust* for the said [*annuitant*], his executors, administrators, and assigns. (*Covenant by annuitant with trustees, and also with purchaser, that he has not encumbered. Power to appoint new trustees. Indemnity to trustees, and power to deduct their expenses*). IN WITNESS &c.]

18. ASSIGNMENT OF ANNUITY TO TRUSTEES, IN TRUST TO EXONERATE PURCHASER OF PART OF THE LANDS CHARGED.

—upon trust to levy annuity exclusively on unsold hereditaments.

19. RELEASE TO GUARDIAN.

19. [RELEASE *to* GUARDIAN *by* WARD *on coming of Age.*

KNOW ALL MEN BY THESE PRESENTS, that [*ward*], of &c., eldest son and heir of [*father*], late of &c., deceased, DOTH, by these presents, remise, release, and for ever quit-claim unto [*guardian*], of &c., late the guardian of the said [*ward*], all and all manner of action and actions, suits, reckonings, accounts, dues, debts, and demands, whatsoever, which he the said [*ward*] ever had, now hath, or which he, his executors or administrators, at any time hereafter can or may have, claim, or demand, against the said [*guardian*], his executors or administrators, for, touching, or concerning the management and disposition of any of the lands, tenements, and hereditaments, of the said [*ward*], or any part thereof, or for or by reason of any monies, rents, or profits by him received out of the same, or any payments made thereout, during the minority of the said [*ward*], or by reason of any matter, cause, or thing whatsoever relating thereto from the beginning of the world to the day of the date hereof. IN WITNESS &c.]

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20. RELEASE OF DOWER.

20. [RELEASE *of* DOWER *in consideration of an* ANNUITY *given by Husband's Will in lieu of Dower.*

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*dowress*], of &c., widow of [*husband*], late of ——, send greeting.

Recital of devise of annuity in lieu of dower.

WHEREAS the said [*husband*], by his last will and testament, dated &c., gave and devised unto me an annuity or yearly sum of ——, clear of all taxes and deductions, to be issuing out of all and every his freehold estates whatsoever, and to be paid unto me half-yearly, by equal payments with powers of entry and distress in case of non-payment thereof; such annuity to be in lieu and full satisfaction of the dower or free-bench, at common law or by the custom, which I might otherwise have, claim, or be entitled unto out of all and every or any of his lands, hereditaments, or estates. NOW

Testatum.

KNOW YE, AND THESE PRESENTS WITNESS,

20. RELEASE OF DOWER.

that I, the said [*widow*], in consideration of the said annuity so secured to me as aforesaid, and in pursuance and part performance of the said last will and testament of my said late husband, deceased, Do hereby declare myself fully satisfied and contented therewith, and do hereby remise, release, and for ever quit-claim unto [*devisees*], of &c., devisees in fee named in the said last will and testament of my said late husband, and to such other person or persons (if any) as the release hereby made may concern, and to their respective heirs and assigns, for ever, all and all manner of dower, right and title of dower or free-bench, whether at common law or by the custom, which I have, or may have, claim, challenge, or demand, or be entitled unto, in or out of all or any of the freehold, copyhold or customary, or other lands, tenements, hereditaments, or estates whatsoever of my said late husband, deceased, or the rents, issues, and profits thereof, or any part or parcel thereof, with the appurtenances; and also all and all manner of actions, causes of action, suits, bills, plaints, accounts, claims, and demands, whatsoever, for or in respect of any such dower or free-bench as aforesaid. IN WITNESS &c.]

Release by dowress.

21. [RELEASE *and* INDEMNITY *to the Executrix of the surviving* TRUSTEE *under a* COMPOSITION DEED, *by the* CREDITORS *and* REPRESENTATIVES OF CREDITORS *named therein, on receiving their last Dividend. Indorsed on the deed of composition.*

21. RELEASE TO REPRESENTATIVES OF TRUSTEE OF CREDITOR'S DEED.

TO ALL WHOM THESE PRESENTS SHALL COME UNTO OR CONCERN, the several persons, parties to, and signing, sealing, and delivering these presents, being respectively creditors of the partnership of the within-named [*debtors*] who were parties to and executed the within-written indenture, or assignees, or other legal personal representatives of such creditors, severally SEND GREETING. WHEREAS (*Recite proceedings under composition deed, will and death of trustee, and probate*). AND WHEREAS the said [*executrix*], as such executrix as aforesaid, hath proposed and agreed to pay and divide the said remaining trust fund or sum of £—, as such further dividend, upon or in respect of the respective remainders of the said several debts mentioned in the schedule to the within-written indenture, to and among the said several

Exordium.

Recitals.

—of agreement to divide residue of trust fund on receiving release.

21. RELEASE TO REPRESENTATIVES OF TRUSTEE OF CREDITOR'S DEED.

persons, parties to, and signing, sealing, and delivering these presents, who, as such creditors as aforesaid, or as assignees or personal representatives of such creditors, or otherwise, are well entitled to receive the same, upon their warranting their respective rights or titles thereto, and accepting the same in full of all further claims under the trusts of the within-written indenture, and executing a full and sufficient release and discharge, or releases and discharges, for the same.

Testatum.

NOW KNOW YE, AND THESE PRESENTS WITNESS, that, in pursuance of the said agreement, and

In consideration of former dividends, and dividend now paid.

in consideration of the premises, and particularly of the said several dividends or sums, amounting in the whole to the aggregate sum of £—, money so as aforesaid already paid or received, and making together —*s.* in the pound of or upon the said several debts mentioned in the said schedule to the within-written indenture, and also of the further dividend or sum of —*s.* in the pound, for or upon all the same several debts, to the said several persons, parties to and executing these presents, and who, as such several creditors of the said partnership as aforesaid, or as assignees, or other legal personal representatives, or otherwise, are now respectively well entitled thereto, in hand paid by the [*executrix*], at or before the execution of these presents by them respectively; (the payment and receipt whereof, and of the said several other dividends, paid under and in pursuance of the trusts within declared, and making therewith —*s.* in the pound of or upon all the said several debts mentioned in the said schedule,

Creditor's release.

they the said several persons, parties to and executing these presents, do hereby respectively acknowledge); they the said several persons, parties to and executing these presents, Do, and every of them DOTH, hereby for themselves respectively, and their respective partners, executors, administrators, and assigns, and every of them, remise, release, and for ever quitclaim unto the said [*executrix*], her executors, administrators, and assigns, and all other the representatives of the within-named [*trustees*], all and all manner of actions, suits, causes of action and suit, bills, bonds, writings, judgments, debts, duties, executions, claims, and demands, whatsoever, both at law and in equity, or otherwise howsoever, for or on account of all or any the said several debts or sums of money mentioned in the said schedule, and set opposite to their respective names, or the name or names of the person or persons from whom they respectively derive title, or for or on account of the interest thereof, or any part thereof, or of the property, mo-

21. RELEASE TO REPRESENTATIVES OF TRUSTEE OF CREDITOR'S DEED.

nies, and premises within conveyed and assigned, or the monies arising therefrom, or the application thereof, under the trusts of the within-written indenture, or otherwise howsoever relative thereto. AND each of them the said several persons executing these presents, for himself, his heirs, executors, administrators, and assigns, Doth hereby severally covenant and agree with the said [*executrix*], her executors, administrators, and assigns, That he the said covenanting party is well entitled to the said remainder of the said debt, or several debts, for or in respect of which the aforesaid ultimate dividend or dividends has or have been so as aforesaid paid to him the said covenanting party, and has, or at the time of such payment had, in himself good right to receive such dividend thereof. *And* that he the said covenanting party, and his executors and administrators, and all persons claiming under him, and all others having any right or claim to the remainder of such debt or debts, will and shall, upon every reasonable request, and at the costs and charges of the said [*executrix*], her executors, administrators, or assigns, make and execute any further or other releases, acquittances, or assurances for the better and more effectually acquitting, releasing, and discharging her the said [*executrix*], her executors, administrators, and assigns, and all other the representatives of the said [*trustees*] respectively, of and from all such debt or debts, and all suits, claims, and demands, whatsoever, in respect thereof, or otherwise for or in respect of the within-conveyed and assigned premises, or the monies arising therefrom, or the application thereof, or otherwise relative thereto. IN WITNESS &c.]

Creditors covenant that they have title to receive debts;

—and will execute further releases upon request.

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22. RELEASE *of a* RIGHT *of* WAY. *Contained in a Conveyance of the Servient Tenement.*

22. RELEASE OF RIGHT OF WAY.

(*RECITALS of title to the dominant tenement* (*if any*) *and of the creation of the right of way*). AND WHEREAS, upon the treaty for the purchase of the said hereditaments and premises intended to be hereby assured, it was agreed, that, for the consideration of £——, to be paid to the said [*releasor*] by the said [*purchaser*], the said [*releasor*] should release unto the said [*purchaser*] all that right of way so granted to the said [*releasor*] as aforesaid. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement,

Recital of agreement.

Testatum.

22. RELEASE OF RIGHT OF WAY.

and in consideration of £——, sterling (*a*), already paid by the said [*purchaser*] to the said [*releasor*], the said [*releasor*] *Doth* hereby remise, release, relinquish, and quit-claim unto the said [*purchaser*] and his heirs for ever, ALL THAT road or way, or right of way, into, upon, through, or over the said hereditaments and premises hereinbefore described, and intended to be hereby assured, so as aforesaid granted to him the said [*releasor*] in and by the said indenture of the —— day of ——, [and all other easements (*b*), commodities, rights, claims, and privileges, whatsoever, which he the said [*releasor*] now hath in, over, upon, or in respect of, the said hereditaments and premises, or any of them], to the end and intent that the said [*purchaser*] and his heirs shall and may, at all times for ever hereafter, have, hold, and enjoy the said hereditaments and premises, with their appurtenances, free from the said right of way, and all other easements, interruptions, claims, and demands, whatsoever, of or by the said [*releasor*], his heirs or assigns. (*Covenant by releasor that he has right to release, ut ante, p.* 491). IN WITNESS &c. (*c*).

Stamp.

(*a*) [The deed will require an ad-valorem stamp upon this sum.]

General words.

(*b*) [The effect of these words should be considered, as the releasor may have other easements which he does not intend to relinquish.]

Title to easements.

(*c*) [As to rights of way and other easements, vide ante, Vol. 4, pp. 148, 668. Since that volume was published, the construction of the Prescription Act, 2 & 3 Will. 4, c. 71, in its most important bearings, has been settled by decision, and the following summary of the present law on the subject (which has already appeared in another work) will probably be acceptable.]

Evidence of prescription at common law.

[Formerly a title could only be made to an incorporeal hereditament by express grant or charter, or by prescription; and a claim by prescription, although it might be supported in the first instance by evidence of uninterrupted modern usage during a period of thirty years, or even less, (*Bailey* v. *Appleyard*, 3 Nev. & P. 260), was yet liable to be rebutted by evidence to the contrary, referring to any period of time, subsequent to the year 1189. *Jenkins* v. *Harvey*, 1 Cr., M. & R. 894. And this rule formerly applied to every claim to an incorporeal right rested upon mere evidence of enjoyment, without any direct evidence of a grant. *Bury* v. *Pope*, Cro. El. 118. But in modern times, the inconveniences attending the proof and support of prescriptions induced the courts to sanction a new mode of establishing certain incorporeal rights, by presuming, from sufficient evidence of enjoyment, a modern grant which has been lost. Evidence of twenty years' user as of right against the owner of the fee and those deriving under him was accordingly held sufficient, if unexplained, to authorize the jury to presume such a grant, even against the Crown; and positive proof of the non-existence of such right at any time before the twenty years did not of necessity form any objection to such presumption. *Penwarden* v.

Modern doctrine of presuming a grant.

Ching, 1 M. & Mal. 400; *Knight* v. *Halsey*, 2 B. & Pul. 206; *Roe* d. *Johnson* v. *Ireland*, 11 East, 284; *Bright* v. *Walker*, 1 Cr., M. & R. 217, 222, 393; *Dewhirst* v. *Wrigley*, 1 C. P. Coop. 239. This period of twenty years was adopted in analogy to the provisions of the Statute of Limitations of James I.; but there was no arbitrary rule; enjoyment for a shorter period, supported by corroborative evidence, might be sufficient, while enjoyment for a much longer period, under less favourable circumstances, might be insufficient to raise the presumption. *Bealey* v. *Shaw*, 6 East, 214; 2 Wms. Saund. 175, n. The presumption of a grant was only resorted to when the evidence was not such as would support a prescription. *Blewett* v. *Tregonning*, 3 Ad. & El. 584. "Such presumptions did not always proceed on a belief that the thing presumed had actually taken place; but, as is properly said by Mr. Starkie in his excellent Treatise on Evidence, Vol. 2, p. 669, (in 3rd ed. Vol. 3, p. 911), 'a technical efficacy was given to the evidence of possession beyond its simple and natural force and operation.' And though in theory it was presumptive evidence, in practice and effect it was a bar." But see S. C. 5 Nev. & M. 313. The liberty of presuming grants in this manner has been somewhat narrowed by the 6th section of the statute 2 & 3 Will. 4, c. 71, which enacts, that, in all cases provided for by that act, no presumption shall be allowed in favour of any claim upon proof of enjoyment for a shorter period than that applicable under the act to the case. Vide infra, and *Bright* v. *Walker*, 1 Cr., M. & R. 222.] 22. RELEASE OF RIGHT OF WAY. Presumptions regulated by 2 & 3 Will. 4, c. 71, s. 6.

[In aid of the acquisition of rights to light and air, and to divert or obstruct ancient streams, it had long been the practice to make presumptions of this kind. With respect to water, every one has a right to have the water which passes over his land to continue to flow in its ancient channels, and no one can either divert any part of it from above, or dam it up from below his land, to his injury. *Wright* v. *Howard*, 1 Sim. & W. 190; *Mason* v. *Hill*, 3 B. & Ad. 304, 5 id. 24*.] Rights in respect of water.

[But acquiescence in such interference during twenty years was generally a bar to the right to complain of it, *Bealey* v. *Shaw*, 6 East, 208, 213: a rule to which this qualification must be added, that, if the course of the water has been by an *artificial* channel, the owner of the land over which it passes does not necessarily acquire a right to its continuance after a lapse of twenty years, unless he has appropriated it to some use; because the right to such artificial flow of water must be founded Artificial watercourse.

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* [This rule, which is founded on the notoriety and long continuance of the enjoyment, does not, in the absence of particular circumstances, apply to subterraneous springs and streams; because as to them there can be no notoriety, and therefore, if a stream has always run through the grounds of A. to those of B., A. may at any time, by draining or otherwise, divert all or any part of the stream from B.'s land, even though he dries up a well recently dug by B. *Acton* v. *Blundell*, 12 Mee. & W. 324; where the Court expressly declined to say what might be the rule if there had been an uninterrupted user by B. for more than twenty years. See *Hammond* v. *Hall*, 10 Sim. 551. Streams passing by known channels through mines are not, perhaps, to be regarded as subterraneous, so as to fall within the rule in *Acton* v. *Blundell*.] Subterraneous springs and streams.

22. RELEASE OF RIGHT OF WAY.

on the supposition of a grant, a presumption which would be strongly opposed by the fact that no use has been made of the subject-matter; but with respect to natural streams user is immaterial, and the diversion of them, however useless they may have been, can only be justified by license or prescription. See *Arkwright* v. *Gell*, 5 Mee. & W. 220; *Magor* v. *Chadwick*, 3 Per. & D. 367; 11 Ad. & El. 571: *Mason* v. *Hill*, 5 B. & Ad. 1.]

Peculiar rule in respect of light and air.

[The right to air and light stands on a different footing from other incorporeal rights. "Every man, in his own land, has a right to all the light and air which will come to him, and he may erect, even on the extremity of his land, buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light, he does not require any consent from the owners of the adjoining land. He, therefore, begins to acquire the right to the enjoyment of the light by mere occupancy. After he has erected his building, the owner of the adjoining land may afterwards within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But, if the light be suffered to pass without interruption during that period to the building so erected, the law implies from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who had erected the building upon his land shall continue to enjoy the light without obstruction, so long as he shall continue the specific mode of enjoyment which he had been used to have during that period. It does not, indeed, imply that the consent is given by way of grant, for although a right of common, (except as to common appendant), or a right of way, being a privilege of something positive to be done or used in the soil of another man's land, may be the subject of legal grant; yet light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant, which the law would imply, not to interrupt the free use of light and air. The right, therefore, is acquired by mere occupancy, and ought to cease when the person who so acquired it discontinues the occupancy. If, therefore, as in this case, the party who has acquired the right once ceases to make use of the light and air which he had appropriated to his own use, without shewing any intention to resume the enjoyment, he must be taken to have abandoned the right." Per Littledale, J., *Moore* v. *Rawson*, 3 B. & Cr. 340. The right to have one's house supported by the abutment of one's neighbour's soil is of a similar nature, and can only be gained by grant, either actual, or presumed from open enjoyment for at least twenty years. *Partridge* v. *Scott*, 3 M. & W. 220; ante, Vol. 4, p. 153.]

Abandonment of right to light and air.

Right to support of soil.

[A claim by prescription was liable to be defeated, as has been seen, by evidence of non-existence, at any time, however remote, if within the period of legal memory; and the modern remedy for this inconvenience, by presuming a grant of moderate antiquity, was not considered to be satisfactory in principle, and was uncertain and inconvenient in practice. See *Blewett* v. *Tregonning*, 5 Nev. & M. 313. To supply the imperfection of the law, Lord Tenterden's "Act for shortening the Time of Prescription in certain Cases," 2 & 3 Will. 4, c. 71, was passed. It

Stat. 2 & 3 Will. 4, c. 71.

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applies to rights of common, *Welcome* v. *Upton*, 5 M. & W. 298; 6 Id. 542: *Wickham* v. *Hawker*, 7 Id. 63, or other *profit* or *benefit* (as distinguished from *easements*) claimed by custom, prescription, or grant, to be exercised in alieno solo;—to "any way or other easement, watercourse, (*Wright* v. *Williams*, 1 M. & W. 77), or use of any water"—and to "the access and use of light to or for any building;" but with a difference as to each of these three classes of rights. Tithes, rents, and services, are excepted from the operation of the statute.]

Rights of common, and other profits à prendre;

Easements.

Tithes, rents, and services excepted.

[As to rights of common and other profits à prendre, the effect of proof of enjoyment *as of right*, and without *interruption* (as distinguished from mere intermission of user, *Payne* v. *Shedden*, 1 M. & Rob. 382; *Carr* v. *Foster*, 2 Gale & D. 753; 3 Q. B. R. 581: *Hall* v. *Swift*, 6 Scott, 167; *Welcome* v. *Upton*, 6 M. & W. 540) for thirty years, in support of a claim which may lawfully be made at the common law, by *custom, prescription, or grant**, is not to be defeated by shewing the commencement of the enjoyment at any time prior to the thirty years, though it may be defeated in any *other* way in which, at the common law, such a claim might have been defeated. Thus, it may be defeated by shewing that the enjoyment for thirty years was by a *parol* license, covering the whole time; for that, at common law, would have rebutted the presumption of a grant. *Tickle* v. *Brown*, 6 Nev. & M. 239. Such a license must be specially replied to a plea of prescription under the act, Ib.; although occasional licenses or a general license not covering the whole time, being inconsistent with a continuous enjoyment as of right, may be given in evidence under a general traverse of the enjoyment. Ib.; *Monmouth Canal Co.* v. *Harford*, 1 C., M. & R. 614; *Beasley* v. *Clarke*, 3 Scott, 262. Again, if the enjoyment at the commencement of the period was by special authority, (as under an act of Parliament), which expired during the period, and the enjoyment for the rest of the period was adverse; these facts, not being inconsistent with an uninterrupted enjoyment as of right during the whole period, cannot be evidence in a traverse of the enjoyment; although, if specially replied, they would shew that the claim could not be supported as a claim by "custom, prescription, or non-existing grant." *Kinloch* v. *Nevile*, 6 M. & W. 805.]

Rule as to rights of common and other profits à prendre: thirty years.

Enjoyment by license, &c.

[But the time during which any person otherwise capable of resisting such claim shall have been infant, non compos, feme covert, or tenant for life, or during which any action shall have been pending, and diligently prosecuted until abated by death, is to be excluded in the computation of the thirty years.]

Disabilities.

[Upon proof of such enjoyment for sixty years (without regarding any disability), the right is to be deemed absolute and indefeasible by any means, except by shewing its origin by some express consent or agreement in writing; that is to say, by shewing its origin under such an agreement *prior* to the commencement of the period of sixty years; for an enjoyment even by parol agreement *within* the period is not such an enjoyment as of right as the act requires. *Tickle* v. *Brown*, 6 Nev. & M. 230.]

Enjoyment for sixty years.

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* [See *Bright* v. *Walker*, 1 C., M. & R. 218; and in illustration, the cases on the Tithe Prescription Act, *Fellowes* v. *Clay*, 3 Gale & D. 407; *Salkeld* v. *Johnson*, 1 Hare, 196.]

22. RELEASE OF RIGHT OF WAY.

Periods of thirty and sixty years, to what epoch to be referred.

The periods of thirty and sixty years are to be deemed and taken to be the periods *next* before *some* suit or action wherein the claim or matter *shall have been* or shall be brought in question. (As to the meaning of these words, see *Parker* v. *Mitchell*, 11 Ad. & El. 788; 3 Per. & D. 155: *Moore* v. *Phillips*, 7 M. & W. 536; *Clayton* v. *Corby*, 2 Gale & D. 181.) It seems, that, unless the claimant's title has been established in some previous action, there must be direct evidence of enjoyment within the year preceding the commencement of the action in which his title is disputed, and not within the year preceding the act complained of. *Richards* v. *Fry*, 3 Nev. & P. 75; 7 Ad. & El. 702, 707: *Flight* v. *Thomas*, 8 Cl. & Fin. 231. But if there is such evidence, proof of enjoyment *prior* to the commencement of the period may be admitted as evidence of the state of things at the commencement of the period. *Lawson* v. *Langley*, 4 Ad. & E. 890. Of course, an ancient right, founded on prescription, and derived by the present claimant by assignment from him with whose ancestors the prescription commenced, will not be defeated by evidence of modern interruption for a period insufficient to confer an adverse title under the Statute of Limitations. *Welcome* v. *Upton*, 6 M. & W. 541.]

Interruptions.

[Nothing is to be deemed an interruption, unless *submitted to or acquiesced in* for one year after notice to the party interrupted. So that an enjoyment for twenty-nine years and a fraction, followed by an interruption not acquiesced in for a whole year, constitutes an enjoyment for thirty years under the act, *Flight* v. *Thomas*, 8 Cl. & Fin. 231; 3 Per. & D. 442; and if there be any series of interruptions, each for less than a year, the enjoyment will suffice, although it be taken against the will of the owner, who endeavours to interrupt it. Ib.]

Rule as to ways and other easements: twenty and forty years.

[The same provisions apply to claims "which may lawfully be made at the common law, by custom, prescription, or grant*, to any way or other easement, or to any watercourse, or the use of any water," to be enjoyed in solo alieno; except that the periods are respectively twenty and forty years. But there is a further provision, in respect of these rights only, that where the servient tenement has been held for any

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* [Therefore, where the enjoyment during part of the period was under an act of Parliament, which ceased to apply, and for the remainder of the period the enjoyment was adverse; the claim was held not to be such as the act contemplated. *Kinloch* v. *Nevile*, 6 M. & W. 806. But in *Bright* v. *Walker*, 1 Cr., M. & R. 220, an enjoyment for twenty years against the lessee of a bishop, being (on account of the lease, see sect. 8) insufficient to confer a right against the bishop, was held to confer no right against the lessee; and one reason given was, that the act being made "for shortening the time of *prescription*" could not contemplate any enjoyment that would not give a title, as prescription does, against all the world. The court seems to have forgotten that the words in the body of the act extend the meaning of the word "prescription," in the title, to all claims that would be supported by custom, prescription, or inference of non-existing grant, (*Kinloch* v. *Nevile*, 6 M. & W. 806; see *Arkwright* v. *Gell*, 5 Id. 203); and, besides, that if the claim in question is not within the act, it is then left as a question of presumption for the jury, at common law. *Richards* v. *Fry*, 3 Nev. & P. 72.]

term, for life, or exceeding three years from the granting thereof, the time of enjoyment during the continuance of such term shall be excluded, (see *Clayton* v. *Corby*, 2 Gale & D. 181), in the computation of the period of *forty years*, in case, within three years following the determination of the term, the claim shall be resisted by the *reversioner*. *Wright* v. *Williams*, 1 M. & W. 100. And this provision has been construed to apply also to the period of twenty years. *Bright* v. *Walker*, 1 Cr., M. & R. 220; see *Beasley* v. *Clarke*, 3 Scott, 264.]

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Proviso where there is an estate for life or years.

[It has been already observed, that the acquisition of a right to *light* stands upon a peculiar ground; and accordingly it has been made the subject of a distinct provision, containing no qualification or reference to the common law; it being simply enacted, that the "actual enjoyment" (whether *as of right* or not is immaterial) of the access and use of light to or for any building, during twenty years, without interruption, and not by virtue of any consent or agreement in writing, shall confer an absolute and indefeasible right. See *Flight* v. *Thomas*, 11 Ad. & E. 695; *Salters' Company* v. *Jay*, 2 Gale & D. 414.]

Rule as to light.

[Lastly, it is enacted, that, in the several cases provided for by the act, no presumption founded on enjoyment for a shorter period than that applicable under the act to the case in question is to be admitted. This proviso is, evidently, only a qualified exclusion of the common law, which seems clearly, except so far as these words control it, to be still applicable, concurrently with the statute, as well as to cases which are not affected by it. See *Hall* v. *Swift*, 6 Scott, 167; *Bright* v. *Walker*, 1 Cr., M. & R. 222; *Richards* v. *Fry*, 3 Nev. & P. 72; 4 M. & W. 496; *Welcome* v. *Upton*, 6 M. & W. 542.]

Exclusion of presumptions from shorter periods.

[The principal difficulty in applying this statute is to determine what is a sufficient uninterrupted enjoyment *as of right* to satisfy it. There must be an enjoyment of the easement, &c., as such, and as of right, for such continuous period as is applicable to the particular case, next before the commencement of the suit. If the benefit has been enjoyed openly for a year or two, and afterwards uniformly by permission asked on each occasion; or if it has been enjoyed secretly and by stealth, (*Partridge* v. *Scott*, 3 M. & W. 229), for several years, and then openly, such enjoyment does not count as an enjoyment under the act. "The words *as of right** cannot be confined to an adverse right from all time, as far as evidence shews; for, if they were so confined, such enjoyment once confessed, could not be avoided by replying, that it was had by contract, which is not adverse. Again, as the legal right to a way cannot pass except by deed, it is plain that the words cannot be confined to enjoyment under a strict legal right, for then a consent or agreement in writing *not under seal* (of which the second section speaks) could not account for such enjoyment. The words, therefore, must have a wider sense, and yet they must have the same sense as the words 'claiming right thereto' in the second section, otherwise there will be incongruities in the construction of the act. It seems, therefore, that the 'enjoyment as of right' must mean an enjoyment had, not secretly, or by stealth, or by

What an uninterrupted enjoyment as of right.

Unsealed license, &c.

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* [As to the necessity of using these words in a plea under the 5th section, see *Holford* v. *Hankinson*, 8 Jur. 463.]

22. RELEASE OF RIGHT OF WAY.

strict sufferance, or by permission asked from time to time, on each occasion, or even on many occasions of using it; but an enjoyment had openly, notoriously, without particular leave at the time, by a person *claiming* to use it without danger of being treated as a trespasser, *as a matter of right*, whether strictly legal, by prescription and adverse user, or by deed conferring the right, or, though not *strictly* legal, yet *lawful to the extent of excusing a trespass*, as by a consent or agreement in writing not under seal, in case of a plea of enjoyment for forty [or sixty] years, or by such writing, or by parol consent or agreement, contract, or license, in case of a plea of enjoyment for twenty [or thirty] years." 6 Nev. & M. 238; see *Bright* v. *Walker*, 1 Cr., M. & R. 219; *Monmouth Canal Co.* v. *Harford*, Id. 631; *Beasley* v. *Clarke*, 3 Scott, 263; *Onley* v. *Gardiner*, 4 M. & W. 500.]

Interruptions.

Unity of possession.

[Enjoyment under a parol license during an entire year within the period, would, therefore, be an interruption to the continuous enjoyment as of right contemplated by the act. Again, unity of possession (of which unity of seisin is primâ facie evidence) is admissible to shew that the enjoyment during any part of the period (not being less than a year) was not enjoyment of the easement, &c. *as such*. *Onley* v. *Gardiner*, 4 M. & W. 496; *Clay* v. *Thackrah*, 9 Car. & P. 47; *Clayton* v. *Corby*, 2 Gale & D. 183; *England* v. *Wall*, 10 M. & W. 699. It must not be forgotten that unity of possession of the dominant and servient tenements does not necessarily do more than *suspend* the easement; an absolute *extinguishment* can only be effected by unity of *seisin* or title. *Thomas* v. *Thomas*, 2 Cr., M. & R. 41. See further on this subject, Gale & Whatley on Easements, passim.]

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23. OF COVENANTS FOR TITLE.

23. RELEASE *of* ACTIONS *for* BREACH *of* COVENANTS *for Title, and also of the* COVENANTS *themselves, by the* DEVISEES *of the deceased* PURCHASER, *to the* VENDOR.

Recital of deeds of conveyance;

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*devisee*], of &c., SENDS GREETING. WHEREAS, by indenture of release, bearing date the —— day of ——, and made between &c., in consideration of the sum of 1000*l.* paid by the said [*purchaser*] to the said [*vendor*], the said [*vendor*] did grant, release, and convey, or otherwise assure, unto the said [*purchaser*], his heirs and assigns, for ever, *All* (*parcels*), To hold the same unto the said [*purchaser*], his heirs and assigns, for ever, To certain uses, for the benefit of the said [*purchaser*], his appointees, heirs, and assigns, for ever. And, by the said indenture of release, the said [*vendor*], for himself, his heirs, executors, and administrators, did cove-

23. OF COVENANTS FOR TITLE.

nant and agree with the said [*purchaser*], his heirs and assigns, that he the said [*vendor*] then had good right, full power, and lawful and absolute authority to grant, release, and convey, or otherwise assure the said hereditaments and premises thereby released, or intended so to be, unto the said [*purchaser*], his heirs and assigns, for ever, to the uses and in the manner thereinbefore expressed, according to the true intent and meaning of the said indenture (*a*). (*Recite any other covenants to which the release is intended to extend*). AND WHEREAS the said [*purchaser*], by his last will and testament, bearing date on or about the —— day of ——, devised all and singular the said lands and hereditaments, by the description of "All that his, the testator's, —— estate, consisting of ——, situate in the parish of ——, in the county of ——, with the appurtenances," to such uses and for such estates as the said [*devisee*] should by any deed or deeds, duly executed, appoint; And, in default of such appointment, to the use of the said [*devisee*], his heirs and assigns, for ever. AND WHEREAS the said testator departed this life on the —— day of ——, without having revoked or altered the hereinbefore-recited devise contained in his said will; which will, soon after his decease, was duly proved by the executor therein named in the Prerogative Court of the Archbishop of Canterbury. AND WHEREAS the said [*devisee*] lately contracted for the sale of the said lands and premises devised to him as aforesaid; and, on the occasion of such sale, the title of the said hereditaments was investigated, when it appeared that the said [*vendor*] had not, at the time of his hereinbefore-recited sale and conveyance, a clear and unimpeachable title to the inheritance in fee-simple thereof, pursuant to his covenant in that behalf hereinbefore recited; but that an estate tail, supposed to have been barred by a common recovery suffered many years since, still remained in force, in consequence of the person in whom the immediate freehold was vested at the time not having concurred in the conveyance to the tenant to the præcipe. AND WHEREAS, after much negotiation and treaty between the

—will of purchaser devising lands to the releasor;

—death of testator;

—that devisee had contracted for the sale of the lands;

—agreement for compromise.

(*a*) If the deed containing the covenants which are to be released is retained by the releasor, a memorandum of the release ought to be indorsed thereon, in order to prevent the deed from falling into the hands of a purchaser uninformed of the fact of the vendor's liability under the covenants having been discharged. Indeed, the release might often conveniently be indorsed on the purchase-deed containing the covenants.

23. OF COVENANTS FOR TITLE.

said [*vendor*] and [*devisee*], it has been finally agreed between them, that, in consideration of the sum of 600*l.* being paid by the said [*vendor*] to the said [*devisee*], he the said [*devisee*] should execute the release hereinafter contained (*b*).

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in

Devisee, in consideration of 600*l.*, releases to vendor the covenant, and all actions, &c.

pursuance of the said agreement, and in consideration of the sum of 600*l.* of lawful British money paid by the said [*vendor*] to the said [*devisee*], at or immediately before the execution of these presents, the receipt whereof the said [*devisee*] doth hereby acknowledge, and therefrom doth absolutely acquit and discharge the said [*vendor*], his heirs, executors, and administrators, he the said [*devisee*] DOTH, for himself, his heirs, executors, administrators, and assigns, by these presents, absolutely remise, release, and for ever quit-

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As to recitals in releases.

(*b*) In preparing releases which are intended to be general, care should be taken to avoid any recitals which by possibility might have the effect of narrowing the operation of the instrument. Thus, a recital, giving a summary of the intended objects of the deed, ought to be framed in exact coincidence with the language of the testatum clause, or (which is commonly the safer plan) should, as in this instance, simply refer to it as explanatory of the import of the instrument.

Extent of the release should be clearly stated.

Where a release is executed on a sum of money being paid by way of compensation for an actual breach of covenant, if the nature of the covenant admit of several distinct and successive acts of non-performance, it ought to be explicitly stated whether the release is to be confined to the existing cause of action, or is to extend to the covenant itself. The former would be the construction if the release were of all claims and demands generally, and not of covenants expressly. (Vide ante, p. 815). Thus, if a covenant for further assurance has been broken by the refusal or neglect of the covenantor to execute any particular conveyance, a release by the covenantee of all demands would only apply to the previous breach, and not to any future breach occasioned by a repeated act of refusal or neglect.

The covenant as to the grantor's right to convey is open to somewhat different reasoning; for the breach necessarily occurs (if at all) at the instant that it is entered into, as the covenantor stipulates for his *present* capacity to convey the fee-simple; so that, although, upon the discovery of a defect of title, the covenant may be then for the first time *known* to have been broken, yet the breach itself must have been instantaneous on its execution. There can be no doubt, however, that, even in this case, if the release were evidently designed to discharge any specific ascertained breach, and not to apply to the generally liability under the covenant, it would receive a restricted construction accordingly; the intention, as collected from the entire instrument, being, according to the universal and invariable rule, the sole governing principle of construction.

23. OF COVENANTS FOR TITLE.

claim unto the said [*vendor*], his heirs, executors, and administrators, the hereinbefore-recited covenant and agreement entered into by the said [*vendor*] with the said [*purchaser*], in and by the hereinbefore-in-part recited indenture of release, and all other covenants and agreements of the said [*vendor*] therein contained, *And also* all and all manner of actions, suits, causes of action and suit, debts, duties, sum and sums of money, reckonings, accounts, claims, and demands whatsoever, at law and in equity, which he the said [*devisee*] now hath, or which he, his heirs, executors, or administrators, can, shall, or may, at any time or times hereafter, have, claim, challenge, or demand upon or against the said [*vendor*], his heirs, executors, or administrators, for or by reason or on account of the same covenants and agreements, or any breach or default already committed or made, or which shall or may hereafter be committed or made therein, or for or by reason or means of any act, matter, or thing in anywise relating thereto. IN WITNESS &c.

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